①

Supreme Court, U.S.
FILED

962038 JUN 25 1997

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

◆

PHILIP MARK SUTTON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

◆

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

◆

PETITION FOR WRIT OF CERTIORARI

◆

JIM DARNELL
Attorney for Petitioner
Texas Bar No. 05391250
310 N. Mesa, Suite 212
El Paso, Texas 79901
Phone: (915) 532-2442
Fax: (915) 532-4549

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

152 pp

QUESTIONS PRESENTED

WHETHER EVIDENCE OF MATERIALITY CAN EVER BE OVERWHELMING AS A MATTER OF LAW IN PROSECUTIONS FOR VIOLATIONS OF BANKING STATUTES IN WHICH MATERIALITY IS AN ELEMENT WHEN THE DISTRICT COURT MAKES A FINDING THAT THE DEFENDANTS' ACTIVITIES DID NOT CAUSE A MONETARY LOSS TO ANY FINANCIAL INSTITUTION.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ERRED IN FAILING TO REMAND FOR A NEW TRIAL ON COUNTS IN WHICH MATERIALITY IS AN ELEMENT.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATIONS TO OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Proceedings In The District Court 2

B. Proceedings Before The Court Of Appeals 3

REASONS WHY THE WRIT SHOULD BE GRANTED 4

EVIDENCE OF MATERIALITY CAN NEVER BE OVERWHELMING WHEN THERE IS NO FINDING OF A LOSS TO A FINANCIAL INSTITUTION. 4

CONCLUSION AND PRAYER 7

APPENDIX

A. DENIAL REHEARING .... App. 1

B. OPINION – 12/05/96 .... App. 3

C. OPINION – 07/24/96 .... App. 54

D. OPINION – 03/08/96 .... App. 68

E. JUDGMENT AND SENTENCE .... App. 110

F. INSTRUCTIONS TO THE JURY .... App. 121

TABLE OF AUTHORITIES

Page

CASES:

Johnson v. United States, 117 S.Ct. 1544 (1997) 5, 6

United States v. Atkinson, 297 U.S. 157 (1936) 5

United States v. Gaudin, 515 U.S. ___, 115 S.Ct. 2310 (1995) 3, 6, 7

United States v. Jobe, 77 F.3d 1461 (5th Cir. 1996) ... 1, 3

United States v. Jobe, 90 F.3d 920 (5th Cir. 1996) 1, 3

United States v. Jobe, 101 F.2d 1046 (5th Cir. 1996) .. 1, 4, 6

United States v. Olano, 507 U.S. 725 (1993) 5, 6

STATUTES AND RULES:

18 U.S.C. §2 .... 2, 5

18 U.S.C. §371 .... 2, 5

18 U.S.C. §1005 .... 2, 5

18 U.S.C. §1014 .... 2, 5

18 U.S.C. §1344 .... 2, 5

28 U.S.C. §1254(1) 2

Fed.R.Crim.P. Rule 52(b) 6

Supreme Court Rule 20.01 1

CONSTITUTION:

Constitution of the United States Fifth Amendment 2

Constitution of the United States Sixth Amendment 2

PETITION FOR WRIT OF CERTIORARI

Petitioner petitions this Court to grant a Writ of Certiorari reviewing the decision of the United States Court of Appeals for the Fifth Circuit.

◆

CITATIONS TO OPINION BELOW

The denial of rehearing entered on March 27, 1997, by the United States Court of Appeals for the Fifth Circuit in *United States v. Jobe, et al.*, No. 94-50646, was entered without opinion and unpublished and appears herein as Appendix A. The published opinion of the Fifth Circuit entered on December 5, 1996, on Second Set of Motions for Rehearing in *United States v. Jobe, et al.*, No. 94-50646, appears herein as Appendix B. The published opinion of the Fifth Circuit entered on July 24, 1996, on Motions for Rehearing in *United States v. Jobe, et al.*, No. 94-50646, appears herein as Appendix C. The published opinion of the Fifth Circuit entered on March 8, 1996, in *United States v. Jobe, et al.*, No. 94-50646, appears herein as Appendix D. The Judgment of the District Court entered on September 16, 1994, appears herein as Appendix E.

◆

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit was entered on March 27, 1997. This petition was timely filed within ninety (90) days of March 27, 1997, pursuant to Supreme Court Rule

20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

◆

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law;
>
> *Constitution of the United States,*
> Fifth Amendment

The Sixth Amendment to the Constitution of the United States provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.
>
> *Constitution of the United States,*
> Sixth Amendment

◆

STATEMENT OF THE CASE

A. Proceedings In The District Court

In a multiple count indictment, Petitioner PHILIP MARK SUTTON was charged with the offenses of (1) conspiracy to commit bank fraud in violation of Title 18, United States Code, Sections 1344, 1005, 1014 and 371; (2) bank fraud in violation of Title 18, United States Code, Section 1344; (3) making false bank entries in violation of Title 18, United States Code, Sections 1005 and 2. It was alleged that Petitioner violated each of said statutes in the course of a check-kiting scheme. The Court's Instructions to the Jury, Appendix F, failed to submit the element of materiality to the jury for its consideration as to each count of conviction. Petitioner was convicted of Counts 1, 2, 4 and 6, RIII 701; and, thereafter, sentenced on September 2, 1994, to ten (10) months imprisonment as to each count with the sentences to run concurrently, RI 53-56. During sentencing, the District Court held that any loss to the financial institutions was too tenuous and sentenced each Defendant based on no loss to the institutions, RXXI 77. From this judgment and sentence, the Petitioner filed a timely Notice of Appeal on September 12, 1994, RI 64.

B. Proceedings Before The Court Of Appeals

During the pendency of this case before the United States Court of Appeals for the Fifth Circuit, the United States Supreme Court rendered its opinion in *United States v. Gaudin,* 515 U.S. ___, 115 S.Ct. 2310 (1995), holding that materiality of a false statement must be determined by a jury rather than a judge, *id.* at 2320. This point was raised for the first time on appeal by Petitioner. In its original opinion, a panel of the United States Court of Appeals for the Fifth Circuit affirmed Petitioner's conviction on all counts without significant discussion. *United States v. Jobe,* 77 F.3d 1461 (5th Cir. 1996). On rehearing, the panel amended its original opinion, but did not detail the strength of the evidence as to materiality. *United States v. Jobe,* 90 F.3d 920 (5th Cir. 1996). On second rehearing, the panel substituted a new opinion. The court assumed that materiality was an element of each count of conviction and held:

> Reviewing all of the above-listed counts of conviction in light of these standards, we conclude that although plain error was committed with respect to the defective jury instructions, and assuming without deciding that the errors affected appellant's substantial rights, it is not necessary to overturn the convictions. Substantial government resources have been expended on these cases to date. The appellants succeeded in defending themselves against some counts (e.g., money laundering), while on those before us, the incriminating evidence, although often circumstantial, is overwhelming. The materiality of the false entries, false representations, and *amounts of money involved* in the expanded check kiting scheme were never seriously contested by the defendants at trial. *Emphasis added.*

United States v. Jobe, 101 F.2d 1046, 1062-3 (5th Cir. 1996).

The language of the United States Court of Appeals for the Fifth Circuit flies clearly in the face of the findings by the District Court. It is this discrepancy which we ask this Court to review upon a Petition for Writ of Certiorari.

◆

REASONS WHY THE WRIT SHOULD BE GRANTED

EVIDENCE OF MATERIALITY CAN NEVER BE OVERWHELMING WHEN THERE IS NO FINDING OF A LOSS TO A FINANCIAL INSTITUTION.

This case is particularly deserving of review as its decision would serve to put some flesh on the decision by this Court in *Johnson v. United States,* 117 S.Ct. 1544 (1997). The United States Supreme Court rested its decision to affirm conviction on the following:

> When the first three parts of *Olano* are satisfied, an appellate court must then determine whether the forfeited error " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings' " before it may exercise its discretion to correct the error. *Olano,* 507 U.S. at 736 (quoting *Atkinson,* 297 U.S. at 160).
>
> In this case, that question must be answered in the negative. As the Court of Appeals noted, the evidence supporting materiality was 'overwhelming.' . . . Materiality was essentially uncontroverted at trial and has remained so on appeal.
>
> *Johnson,* 117 S.Ct. at 1550.

Johnson allowed the Court to determine when materiality has been established as a matter of law. The instant case would allow the United States Supreme Court to determine when a question to the jury on the element of materiality *must* have been submitted. It would thus set, with *Johnson, supra,* a floor and a ceiling between which the United States Courts of Appeal could operate in deciding whether the evidence of materiality is "overwhelming" in a particular case.

The present case presents issues very similar to those presented in *Johnson,* 117 S.Ct. 1544 (1997). Petitioner was convicted on counts of conspiracy to commit bank fraud in violation of 18 U.S.C. §§1344, 1005, 1014 and 371; bank fraud in violation of 18 U.S.C. §1344; and making false bank entries in violation of 18 U.S.C. §§1005 and 2.

Appendix E. The United States Court of Appeals for the Fifth Circuit assumed that materiality was an element of most or all of the counts of conviction. *United States v. Jobe,* 101 F.3d 1046, 1061 (5th Cir. 1996). Materiality was not submitted to the jury as an element to be determined in any offense. Appendix F. *United States v. Jobe,* 101 F.3d at 1061. Petitioner did not object to the court's charge on this point. Thereafter, the decision in *United States v. Gaudin,* 515 U.S. ___, 115 S.Ct. 2010 (1995) was rendered. *Johnson v. United States,* 117 S.Ct. 1544 (1997) held that such error was reviewable as "plain error" under Federal Rule of Criminal Procedure 52(b) and the standards set forth in *United States v. Olano,* 507 U.S. 725 (1993). The United States Court of Appeals for the Fifth Circuit conducted such an analysis and determined that the evidence of materiality was overwhelming. *United States v. Jobe,* 101 F.3d 1046, 1063 (5th Cir. 1996). The United States Court of Appeals for the Fifth Circuit was wrong. The District Court found that evidence of a loss to any financial institution was too tenuous to support *any* upward adjustment at sentencing based on the amount of loss and questioned whether, in fact, a loss occurred, RXXI 77.

The amount of loss is not an element of any count of conviction, but is certainly relevant evidence as to whether alleged misrepresentations to financial institutions were, in fact, material. It is evidence a jury could and should consider in deciding the importance or materiality of any statement alleged to have been made to or entered on the books of a financial institution. In short, by deciding that there may have been no loss, the District Court acknowledged that there was a real fact issue for the jury to decide, and the *Gaudin*-type error "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings." *United States v. Olano,* 507 U.S. 725, 736 (1993).

By failing to recognize the obvious questions of materiality before it, the United States Court of Appeals for the Fifth Circuit erected an impenetrable barrier through which the most agile and aggrieved appellant could not pass. This case will allow the United States Supreme Court to strike down that impenetrable barrier while still insuring that materiality must be contested before reversible *Gaudin* error may be found.

◆

CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit; thereafter hold that the evidence of materiality was not overwhelming, and remand this cause to the United States Court of Appeals for the Fifth Circuit with instructions to reverse the conviction of Petitioner and remand to the United States District Court for the Western District of Texas for retrial.

Respectfully submitted,

JIM DARNELL
Attorney for Petitioner
Texas Bar No. 05391250
310 N. Mesa, Suite 212
El Paso, Texas 79901
Phone: (915) 532-2442
Fax: (915) 532-4549

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50646

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

BILLIE MAC JOBE; PHILIP MARK SUTTON;
STANLEY PRUET JOBE and FERNANDO NOVOA
Defendants-Appellants

Appeal from the United States District Court for the Western District of Texas, El Paso

---

(Filed Mar. 27, 1997)

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion December 5, 1996, 5 Cir., F.3d)

Before JONES and STEWART, Circuit Judges.*

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

---

* This order is being entered by a quorum of this Court pursuant to 28 USC Section 46(d).

Rehearing En Banc, (FRAP and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearings En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50646

D.C. Docket No. EP-93-CR-420-H

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

Versus

PHILIP MARK SUTTON,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before JONES, STEWART, and PARKER*, Circuit Judges.

JUDGMENT ON REHEARING

(Filed Dec. 5, 1996)

This cause came to be heard on defendants-appellants' petition for rehearing;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the district court in this cause is affirmed.

ISSUED AS MANDATE: APR 16 1997

---

* After oral argument, Judge Parker recused himself from any further participation in this matter. This opinion reflects only that of Judges Jones and Stewart.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50646

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

BILLIE MAC JOBE; STEPHEN TAYLOR; PHILIP MARK SUTTON; STANLEY PRUET JOBE and FERNANDO NOVOA

Defendants-Appellants

Appeals from the United States District Court for the Western District of Texas, El Paso

---

(Filed Apr. 10, 1997)

ORDER:

(x) The motions of appellants for (x) stay of the issuance of the mandate pending petition for writ of certiorari are DENIED.

( ) The motion of for ( ) stay ( ) recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including ___, the stay is in force until the final disposition of the case by the Supreme Court, provided that the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed is also filed with this court within the time stated above. The clerk shall issue a mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of this stay unless the certificate is filed with the clerk of this court within that time.

/s/ Edith H. Jones
UNITED STATES
CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 94-50646

United States of America,

Plaintiffs-Appellee,

versus

Billie Mac Jobe, Stephen Taylor, Philip Mark Sutton, Stanley Pruet Jobe, and Fernando Novoa,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Texas

(Filed Dec. 5, 1996)

OPINION ON SECOND SET OF MOTIONS FOR REHEARING

Before JONES, STEWART and PARKER,* Circuit Judges.

EDITH H. JONES, Circuit Judge:

The court herewith substitutes the following opinion for its previous opinion, 77 F.3d 1461 and opinion on rehearing, 90 F.3d 920:

---

* After oral argument, Judge Parker recused himself from any further participation in this matter. This opinion reflects only that of Judges Jones and Stewart.

Appellants Billie Mac Jobe ("Billie Mac"), Stanley Pruet Jobe ("Stanley"), Stephen Taylor, Philip Mark Sutton and Fernando Novoa were convicted by a jury of various offenses undertaken to organize, conduct, and maintain an elaborate and expanded check-kiting scheme through El Paso banks for over a year and a half. On appeal, they pose numerous challenges to their convictions and sentences. After carefully considering these challenges and the underlying record, this court AFFIRMS the convictions for all of the appellants, except that we vacate Stanley's convictions on Counts 5 and 6, and we vacate Stanley's and Novoa's managerial or supervisory sentencing enhancements and REMAND these two defendants for resentencing.

FACTUAL BACKGROUND[1]

The appellants were indicted for bank fraud, in violation of 18 U.S.C. § 1344 and 2, and for conspiracy to commit bank fraud, to make false entries in bank records, and to obtain loans via false statements in loan applications, contravening 18 U.S.C. § 371. In addition, the indictment charged that some or all of the appellants had made false statements on loan applications,[2] false bank entries, reports, and transactions,[3] laundered funds,[4] or aided and abetted such activities.[5] The indictment requested a criminal forfeiture of property.[6]

---

[1] Our review of the record was much more difficult because the parties frequently either furnished incorrect record citations or no citation at all.

[2] 18 U.S.C. § 1014.

[3] 18 U.S.C. § 1005.

[4] 18 U.S.C. § 1956(a)(1)(A)(i).

The district court bifurcated the criminal trial and the request for criminal forfeiture. After nearly two weeks of trial on the criminal charges, the jury returned the following verdicts: all defendants were convicted of conspiracy to commit bank fraud ("Count 1"); Billie Mac was convicted of bank fraud, while Stanley, Taylor, Sutton, and Novoa were convicted of aiding and abetting this bank fraud ("Count 2"); Taylor and Sutton were convicted of making false bank entries in violation of 18 U.S.C. §§ 1005 and 2 (collectively, Counts 4, 6, and 16); and Stanley was convicted both of aiding and abetting Sutton to make a false bank entry (Count 6) and of making false statements on a bank loan application (Count 5).[7]

Although each appellant was convicted by the jury of various offenses undertaken to organize, conduct, and maintain an elaborate check kiting scheme, at the sentencing hearing, the district court found no evidence of monetary loss to any of the financial institutions involved. In part for this reason, the appellants received light concurrent sentences: Billie Mac was sentenced to eighteen months incarceration and fined $30,000; Stanley received five months incarceration, five months of community confinement in a residential facility or half-way house, and a $15,000 fine; Taylor, ten months incarceration; Sutton, ten months incarceration; and Novoa, five months incarceration and five months of community confinement in a residential facility or half-way house; the appellants were also ordered to serve three-year terms of supervised release.

---

[5] 18 U.S.C. § 2.

[6] *See* 18 U.S.C. §§ 982(a)(1)-(a)(2)(A), 982(b)(1)(A)-(B).

[7] The district court, after a separate forfeiture proceeding, entered a judgment of acquittal on those allegations.

A discussion of some of the voluminous evidence concerning the appellants' relationships to the involved financial institutions and the crucial transactions involved in the prosecution is necessary to understand this opinion's analysis.

Billie Mac was a 1/3 owner, officer and director of Jobe Concrete Products, Inc., in El Paso, Texas. He also owned the Jobe Bar Track Ranch and was a part owner, officer and director of Cal-Tex Spice Co. He and his son, Stanley, owned a 40% share of First Park National Bank ("FPNB") of Livingston, Montana, a federally insured financial institution. Billie Mac maintained checking accounts at FPNB as well as at El Paso State Bank ("EPSB"), a federally insured, state chartered bank in El Paso; Jobe Concrete Products and Cal-Tex Spice had checking accounts at EPSB. Billie Mac was a shareholder of EPSB.

Stanley, Billie Mac's son, was president and a 1/3 owner of Jobe Concrete Products, Inc., a partial owner and director of Cal-Tex Spice Co. and a shareholder and director of EPSB. At FPNB in Montana, Stanley maintained a checking account and sat on the board of directors.

The remaining appellants are employees of some of the financial institutions involved. Taylor was the president of EPSB. Novoa, as a cashier and officer of EPSB, approved significant wire transfer transactions involving Billie Mac. After leaving his employment with EPSB, Novoa became president of Cal-Tex Spice and performed various financial and administrative work for Jobe Concrete Products. Sutton was the president of another federally insured bank used in the kite, Continental National Bank ("CNB").

The scope of the expanded check kite was uncovered essentially by FBI special agent Randy Wolverton ("Wolverton"), whose analysis is of the activity in several Jobe checking accounts from December of 1989 through July of 1991, revealed that a large kite was underway involving Billie Mac and Stanley and their checking accounts at CNB, TCB, FNPB, and EPSB.

In order to manipulate and maximize the float, or lag time between transactions in the banking system, Billie Mac and his cohorts inflated his account balances artificially by making countless wire transfers based on uncollected funds, by writing checks against uncollected or nonexistent funds, and by consummating fraudulent loans that were camouflaged by false entries or statements in bank records. As a result of these machinations, very large checks were routinely paid in full despite the actual insufficiency of funds to cover them. Billie Mac's check kite was remarkably efficient; unlike the vast majority of check kites, this one not only stayed constantly ahead of the lag but never did self-destruct. Evidence at trial demonstrated that none of the checks written by Billie Mac was ever dishonored or returned for insufficient funds, and all of the loans used to commence the kiting scheme were paid in full and with interest to the lenders.

Further evidence of the "success" of the check-kiting is revealed by the vast sums of money floated. Wolverton testified that bank records for December 1, 1989 through March 12, 1990, created the impression that $150,000,000 had been deposited into the Jobe accounts, although less than 15% of that figure, or approximately $20,000,000, was actually present in these accounts. Similarly, from April through June of 1991, Wolverton explained that although bank records indicated that $58,000,000 was deposited into these accounts, "77% of those, or about $44,000,000 worth of those deposits, were nothing more than checks and wire transfers being exchanged with each other through these accounts, thereby artificially inflating the accounts." Only $13,000,000 was actually deposited into the accounts.

Profits from the scheme were used to finance business ventures for Billie Mac and Stanley. For example, in late 1989, Cal-Tex Spice Co., co-owned by Billie Mac, purchased a spice plant from the Baltimore Spice Co. for nearly $3,500,000. Austin Hale ("Hale"), the credit manager and eventually vice-president of Jobe Concrete Products, testified that neither Jobe Concrete Products nor Billie Mac had enough liquidity to fund these purchases. Hale further testified that Stanley concurred and expressed his concern to Hale that the company needed cash not only to finance its investment and business activities, but also so that his father, who was "overly stressed about the situation", would not need to work as hard.

Billie Mac commenced the kite by opening a checking account for the Jobe Bar Track Ranch at CNB. Before it was officially opened, Billie Mac wrote himself a check from the new account or starter booklet for $990,000, endorsed this check, and deposited it at EPSB. The opening balance of the CNB checking account was, however, only $1,000. Sutton was the account officer at CNB supervising the Jobe Bar Track Ranch checking account.

After the CNB check was deposited at EPSB, EPSB issued a cashier's check for $3,536,347 to Billie Mac signed by Taylor, the bank president. Although standard banking practice would require EPSB to post an entry in its books or records indicating that the cashier's check had been issued, no such entry was made in EPSB records that day; in fact, no entry was made into EPSB records until several days later on January 4, 1990. Nearly a week earlier, on the same afternoon that he obtained the EPSB check, Billie Mac used this cashier's check to purchase the spice plant.

When the original $990,000 CNB check was presented for payment at that bank, Martha Karlsruher ("Karlsruher"), a senior vice president and bank cashier, noticed that this large check had been written on the Jobe Bar Track Ranch account before it had opened and that the balance in the account was merely $1,000. She immediately advised Sutton of her findings, but he authorized forced payment of the check nonetheless, explaining that a pending loan from CNB to Billie Mac would provide the necessary funds.

As Sutton had explained, CNB did lend Billie Mac $925,000, its legal lending limit, on January 8, 1990 and back-dated this loan to January 5. The loan's stated purpose was to "[r]eplenish personal liquidity utilized in the purchase of Baltimore Spice of Texas." However, the loan did not replenish Billie Mac's personal liquidity, but was rather deposited directly into the Jobe Bar Track Ranch checking account, so that the $990,000 check that had been presented for payment could clear. Karlsruher further explained that because the bank's management and loan committee were "in a hurry to fund the loan [and] disburse the monies to the customer," they did not review Billie Mac's loan application before approving it.

This type of suspicious activity continued in the Jobe Bar Track Ranch account and in other accounts including the Jobe Concrete Products checking account at Texas Commerce Bank ("TCB"). In February or March of 1990, Hale, Jobe Concrete's credit manager, learned that Billie Mac was signing checks on the Jobe Concrete Products account but failing to list either a payee or amount on the company's check log. Hale began to be "suspicious of a check kite." As these suspicions grew, he "started looking for another job" and eventually quit in November of 1991.

The check kiting activity also became more obvious to employees in the banks used in the kite. For instance, from January through July of 1990, Karlsruher, who had already noticed unusual activity in the Jobe Bar Track Ranch account at CNB and had discussed this with Sutton, warned Sutton repeatedly that she suspected kiting by Billie Mac and that any further loans to him would exceed CNB's legal limit. Sutton assured her that "it was a normal business practice for certain companies to operate this way," but Karlsruher disagreed and had not observed such practice in her experience as a banker.

Sutton's actions began to breach standard banking practice or policy. He occasionally extended CNB's closing deadline in order to give Billie Mac sufficient time to deposit or wire funds to cover overdrafts.[8] Karlsruher testified that Billie Mac was virtually the only customer who received such specialized treatment.[9] Further, despite express warnings from Karlsruher that kiting was going on and that a criminal referral should be filed regarding Billie Mac's activities, Sutton continued to approve forced payment of countless checks written by Billie Mac far in excess of the balance in the Jobe Bar Track Ranch account at CNB. Although Karlsruher could have filed a criminal referral regarding the activity, she explained that she did not do so because she was "provided a copy of a board resolution that ordered management not to file this referral."

Others associated and employed by CNB, who could not help but notice that Sutton was approving numerous forced payments on checks written by Billie Mac, came to share Karlsruher's concerns about the check kite. Patrick Kennedy ("Kennedy"), CNB's attorney, reviewed some of

---

[8] The closing deadline at CNB was normally 2:00 p.m. If the bank could not settle its funds by that time, these funds were not available for overnight investment and the bank risked losing the corresponding overnight interest.

[9] As Karlsruher explained, "[t]he only [other customer] that comes to mind, but that was a few years later, that [sic] would have been El Paso Auction."

Billie Mac's activities in the Jobe Bar Track Ranch account and suggested that CNB file a criminal referral. Although Kennedy repeatedly attempted to discuss this suggestion with Sutton and to obtain additional information from him, Sutton was unresponsive. Patricia McLean ("McLean"), CNB's loan review officer, not only suggested that a criminal referral be filed, but also expressed concerns to Sutton that if CNB continued to lend to Billie Mac or any affiliated entity, the bank might exceed its legal lending limits. Yet again, these warnings went unheeded.

Indeed, loan activity at CNB involving the Jobes continued. On May 21, 1990, with Sutton acting as the bank's loan officer, CNB funded a $750,000 loan to Deer Creek Spice Co., guaranteed by Stanley. In a loan presentation form, an internal document prepared by bank employees, the purpose of the Deer Creek Spice loan was described as acquisition of inventory, and the loan principals were listed as Stanley and Frank Owen IV. Although the size of the Deer Creek Spice loan mandated review by CNB's management loan committee, no such review occurred.

On the very day that the Deer Creek Spice loan was authorized, Stanley endorsed the check for the proceeds and turned it over to Billie Mac who, in turn, deposited it into the cashier's checking account at EPSB. The proceeds of the Deer Creek Spice loan were used to pay for cashier's checks that Billie Mac had obtained from EPSB earlier in the day. These cashier's checks had been deposited at CNB to allow a $750,000 check written against the Jobe Bar Track Ranch account to clear; not surprisingly, the $750,000 check had been written by Billie Mac and was payable to him.

Eventually, Sutton, Karlsruher, and McLean were asked to meet with Kennedy, John Wright, the chairman of the board of CNB, and Jack Cardwell, a board member, to discuss Billie Mac's relations with the bank. After the meeting, Karlsruher testified that Sutton ordered her not to contact either bank directors or bank attorneys without his preclearance; he threatened to fire her or any other employee who filed a criminal referral on Billie Mac and promised her a promotion and raise for her cooperation. Sutton stressed to her that a criminal referral on Billie Mac "would cause [the Jobes] serious financial harm and set-backs and that the other banks they were dealing with may call their loans . . . once an investigation ensued." Finally, however, after a CNB board meeting in June of 1990, the Jobe Bar Track Ranch checking account was closed and Billie Mac paid CNB for his use of uncollected funds an amount equal to what the bank would have earned in an overnight investment of those funds at the federal funds rate. Of course, as Karlsruher explained, the federal funds rate is lower than the commercial loan rate.

Undaunted, Billie Mac and his cohorts continued their expanded check kite even after the CNB account closed. Loans from other banks were used to float the kite, and unconventional wire transfer procedures both inflated checking account balances artificially and concealed insufficient funds or overdrafts. Unlike checks, wire transfers experience no float or lag time. When a normal electronic wire transfer occurs, funds are simultaneously deducted from the transferring institution's account at the Federal Reserve and credited to the recipient's bank account.

But Billie Mac's multiple wire transfers were not conventional ones. Taylor, the president of EPSB, and Novoa, the bank's cashier and senior officer in charge of accounting and of the wire transfer room, authorized wire transfer personnel to credit Billie Mac's checks immediately and to make wire transfers for him without waiting for the necessary funds to be collected.[10] Diana Vincent, an internal auditor with EPSB, testified that the countless wire transfers completed for Billie Mac on uncollected funds violated standard EPSB policy that all wires be paid for with collected funds. Vincent also testified that had Billie Mac been forced to comply with bank policy and deposit sufficient funds before conducting a wire transfer, his insufficient accounts would have appeared on the bank's uncollected funds or overdraft reports. Billie Mac's accounts escaped these reports because Novoa was initialing most of Billie Mac's checks and approving them for immediate credit.[11] According to Laura Avila an employee in the EPSB wire transfer room, both Novoa and Taylor would initial the checks to authorize immediate credit.

Because of the specialized treatment that Billie Mac received from Taylor and Novoa at EPSB, he made the bank's wire transfer department a second home, visiting several times daily from January through September of 1990 and sending hundreds of wire transfers during that time. At trial, the testimony of Avila and Maria Reyes Novoa's administrative assistant who supervised the wire transfer room, indicated that Billie Mac's transfers began at around $50,000 a day, but quickly grew to $500,000 and then to a combined daily total of $1,000,000.

---

[10] Although this practice is unconventional, the government concedes that it is not necessarily illegal. Banks enjoy some discretion to extend immediate or "next day" credit on uncollected funds.

[11] Although Vincent explained that, in most instances, Novoa's initials appeared on the checks, she admitted that occasionally other officers or authorized personnel would initial them.

These frantic and unconventional wire transfers led other employees at EPSB to suspect kiting. For instance, Reyes grew concerned about the fact that Billie Mac was allowed to conduct wire transfers when his accounts were insufficient to pay for these transfers. Reyes recounted that once, after she had verified that the account against which Billie Mac had intended to pay for the transfer had insufficient funds, she took the check to Novoa and, although she did not expressly inform him of the insufficiency, he ordered her to proceed with the wire transfer. As this transfer activity continued, Reyes eventually spoke with Taylor, but to no avail. She explained, "[s]ince I was concerned, I went and asked [Taylor], you know, if he was aware that the checks were, you know, going through. And he told me that he was going to check into it and that he would get back to me. But he never got back to me."

Yvonne Pearson, an employee in the proof department at EPSB, testified that since Billie Mac was allowed to conduct transfers on uncollected funds, proof department employees were allowed to override the proof machine's time consuming determination of the float for a check. To circumvent the proof machine, Billie Mac's checks were deposited using special deposit slips initialed by bank officers to allow for next-day availability;

most of these deposit slips were initialed by her boss, Novoa. Furthermore, when Billie Mac would present such a deposit slip, a special transaction code would be entered into the bank's records that would prevent the checks from appearing on the bank's uncollected funds report. Because of these suspicious activities and practices, Pearson concluded that she "knew" that Billie Mac was kiting checks.

Vincent, EPSB's internal auditor, warned Taylor in a memorandum that Billie Mac was kiting checks "to the tune of $790,000 to $1,760,000 a day, and this amount is steadily increasing," as well as conducting wire transfers on uncollected funds. Moreover, she explained that Taylor's and Novoa's decision to extend Billie Mac next day availability on checks made it difficult to ascertain the full extent of the ongoing kite. Taylor delayed responding to Vincent for nearly three weeks before asking her "to track the activity for a few days and report back to him."

Vincent did exactly that. After tracking Billie Mac's accounts for two days, she sent Taylor another memorandum detailing transactions in which Billie Mac was given more than $3,200,000 in immediate credit to pay for wire transfers from EPSB. After Taylor received this memo, Vincent testified that to her knowledge, Taylor did not take any remedial action and did not speak with her about either the memo or the activity which had been tracked.

Even Billie Mac's own employees began to question the deposit and wire transfer activity at EPSB. Hale, the vice president of Jobe Concrete Products, testified that he had a conversation with Billie Mac regarding this activity.

According to Hale, Billie Mac explained that Novoa had developed a system by which he could receive immediate credit for deposits merely by using special deposit slips.[12] Eventually, Novoa resigned his position at EPSB and went to work for his esteemed customer, Billie Mac, as president of Cal-Tex Spice and at Jobe Concrete Products.

Upon Novoa's departure from EPSB, Barbara Baker ("Baker"), the acting cashier for the bank, learned about the practice of allowing Billie Mac to conduct wire transfers on uncollected funds. She testified that this practice did not leave a good audit trail and impeded the bank's ability to analyze float and collectability of Billie Mac's checks. Baker then sent Taylor a memo reiterating these conclusions and suggesting that funds be collected from Billie Mac before he be allowed to conduct a wire transfer.

After sending the memo to Taylor, Baker met with him. She testified that during this meeting, Taylor appeared shocked by the activity in Billie Mac's accounts; as Baker recalled, "[Taylor] had the memo in his hand and he just kind of shook his head a little bit and said, 'Billie Mac is kiting. How long did he think he could get away with this?' " Taylor then gathered the copies of Baker's memo and "threw them in the trash and he said he wanted all the copies out of circulation. He didn't want any copies of the memo in the bank." However, even after receiving memoranda from both Baker and

---

[12] On appeal, Novoa objects to this portion of Hale's testimony under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968). The objection will be discussed *infra*.

Vincent, Taylor still approved wire transfers for Billie Mac on uncollected funds.

Perhaps exhausted by his daily trips to the wire room at EPSB, Billie Mac began wiring funds from CNB where he no longer had an account. Much as Taylor and Novoa had ordered at EPSB, Sutton authorized Billie Mac to conduct wire transfers on uncollected funds, even though no other customer was regularly extended such a privilege. However, these transactions, unlike the transfers at EPSB, were appearing regularly on the bank's "deficit available balance report" as suffering from a large, uncollected balance. Sutton approached Karlsruher with a proposal to give Billie Mac's checks a special transaction code which would camouflage them from the bank's reporting system. She refused to participate in such a scheme.

The very day that bank examiners arrived at CNB to analyze the transfer activity, Billie Mac stopped making wire transfers from that bank. As the bank examiners analyzed accounts at CNB and at EPSB, they began to discover the vast extent of Billie Mac's kiting scheme. For instance, while EPSB was lending Billie Mac and Stanley over $1,000,000 each year, the bank's average collected balances were negative.

While the bank examiners continued to investigate, Taylor spoke to Tom Burress ("Burress"), one of the examiners analyzing loans and accounts at EPSB. Taylor wanted to explain the cashier's check for over $3,500,000 that Billie Mac had been given on December 29, 1989, without any confirmation that he had sufficient funds to pay for it. Taylor told Burress "[t]hat Fernando Novoa presented the check for him to sign. Taylor signed the check without verifying that there [sic] collected funds in the account sufficient to pay for the check. His stated reason was that he had faith in the cashier that that [sic] was okay." Taylor also told Burress that he believed that Novoa had held some checks written by Billie Mac in his desk until January 4, 1990, the date on which the cashier's check was actually purchased. The next day, however, Taylor changed his story, suggesting that "he was wrong in accusing [Novoa] of holding the checks in his drawer. And prior to this occurrence, he had no reason to fault [Novoa's] work."[13]

As the involvement of bank examiners and federal agents intensified, Billie Mac's expanded check kite came to a crashing halt. At trial, there was substantial disagreement over the loss, if any, that the banks involved in this kite had suffered. All of the loans and checks had been paid and honored. From this fact, Rene Pena ("Pena"), a certified public accountant who testified as a defense expert, concluded that the banks had suffered no loss. Although Pena recognized that the various Jobe accounts were frequently in overdraft, he noted that this overdraft was usually corrected quickly. According to Pena, Billie Mac was merely "actively utilizing the loans in a constant cash management . . . of running the [Jobe] entities as a whole."

---

[13] Novoa challenges the admission of Taylor's statements through Burress under *Bruton*. This issue will be discussed *infra*.

DISCUSSION

I. Appellants' Common Challenges to their Convictions

A. Juror Misconduct

Billie Mac, Stanley, Sutton, and Novoa appeal the district court's denial of an evidentiary hearing to investigate allegations of juror misconduct and its denial of their motions for a new trial based partially on this alleged misconduct.

Appellants complain that during the trial, John A. Shamaley ("Shamaley"), one of the jurors, was told by a relative that Billie Mac had "previously been convicted in another bank fraud case." In an affidavit submitted to the district court, Shamaley explained that at some time during the trial, he told David Carnes a relative, that Carnes's employer, Jack Cardwell had been mentioned during the trial; Cardwell was a member of the board of directors of CNB. Carnes told Shamaley that Billie Mac had previously been convicted of bank fraud and suggested to Shamaley that because of this prior conviction, "he would not be at all surprised to find that something improper was going on here." However, Shamaley acknowledged in his affidavit that

> [t]here was *no evidence presented at the trial that Billie Mac Jobe had any previous arrests or convictions. I did not relay this information to any of the other jurors* on this case, but I was aware after the conversation with David Carnes that Mr.

> Jobe had previously been convicted of the same offense that he was charged with in this case.[14]

(emphasis added).

This court reviews the district court's denial of a motion for new trial for abuse of discretion. *United States v. Sanchez-Sotelo,* 8 F.3d 202, 212 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1410 (1994). Likewise, "[t]he procedures used to investigate allegations of juror misconduct and the decision as to whether to hold an evidentiary hearing are matters which rest solely within the sound discretion of the district court." *United States v. Roberts,* 913 F.2d 211, 216 (5th Cir. 1990), *cert. denied sub nom., Preston v. United States,* 500 U.S. 955, 111 S. Ct. 2264 (1991).

Recently, this court reiterated the principle that in any trial there is an initial presumption of jury impartiality. *United States v. Ruggiero,* 56 F.3d 647, 652 (5th Cir. 1995), *cert. denied,* ___ U.S. ___, ___ S. Ct. ___ (1995). This presumption may be defeated, however, through evidence that the extrinsic factual matter actually tainted the jury's deliberations. *Id.* (*citing United States v. O'Keefe,* 722 F.2d 1175, 1179 (5th Cir. 1983)). A district court must investigate the asserted impropriety only when a colorable showing of extrinsic influence is made. *Id.*

---

[14] In fact, the information that Carnes relayed to Shamaley was technically incorrect. In 1979, Billie Mac had pleaded guilty to one count of mail fraud. At a pretrial hearing, the district court indicated that this prior conviction would be admissible at trial for impeachment purposes only if Billie Mac testified; he did not.

Ruggiero not only examined when a district court must investigate alleged juror misconduct, but also explained

> . . . that a defendant is entitled to a new trial when extrinsic evidence is introduced into the jury room unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it.

Id. (citations omitted). Hence, when extrinsic evidence is introduced into the jury room, the defendant enjoys a rebuttable presumption of prejudice and "the government has the burden of proving the harmlessness of the breach." *Id.* (citations omitted). When the district court considers whether the government has carried this burden, it should examine "the content of the extrinsic material, the manner in which it came to the jury's attention, and the weight of the evidence against the defendant." *Id.* at 652-53 (citations omitted).

In the instant case, the district court investigated the alleged impropriety when it considered Shamaley's affidavit. Through this affidavit and through the evidence at trial, the court was able to conduct the inquiry mandated in *Ruggiero.* Having done so, the court concluded that there was no reasonable possibility that the extrinsic information had prejudiced the appellants. When discussing Billie Mac, the court reasoned that

> The circumstances fail to indicate that Defendant Billie Mac Jobe was prejudiced by the incident. Juror Shamaley obviously attributed no significance to the incident, because he did not report it to the Court or to any other juror. Furthermore, the record shows that Billie Mac

> Jobe was named as a defendant in six counts that were submitted to the jury for a verdict, and the jury found Jobe not guilty as to four of those counts. . . . Under the facts of this case, the Court is unable to find a reasonable possibility that the extrinsic information communicated to one juror prejudiced the Defendant.

Because the information relayed to Shamaley did not taint his deliberations, the information was not relayed to any other jurors, and the evidence against Billie Mac on the counts of conviction was overwhelming, the district court did not abuse its discretion when it denied the appellants' request for a new trial without first ordering an evidentiary hearing.[15] It is unnecessary to apply the *Ruggiero* factors separately to each of the other defendants, as there is no likelihood that they were prejudiced in any way by the tainted report of Billie Mac's prior criminal conduct.

---

[15] Additionally, as *Ruggiero* explains, a court is limited in its ability to inquire into jury deliberations. Federal Rule of Evidence 606(b) forbids a juror from testifying about deliberations, and this rule also bars juror testimony regarding

> at least four topics: (1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberation, and (4) the testifying juror's own mental process during the deliberations.

Ruggiero, 56 F.3d at 652. Given these limitations, an evidentiary hearing would have provided the district court with virtually nothing but what was already contained in the Shamaley affidavit.

B. Jury Instructions

All of the appellants contend that the district court erroneously declined to submit their requested instruction on good faith to the jury. Furthermore, the appellants argue that the instruction given to the jury somehow shifted the burden of proof from the government to the appellants when it failed to inform jurors that the government carried the burden of negating their claims of good faith. The appellants also suggest that the district court erroneously limited their defense of good faith by failing to extend this defense to the false entry offenses.

Billie Mac urges similar error with respect to his requested instructions on willfulness and specific intent. He notes that the district court did not explicitly define either term and suggests that the court's omission seriously impeded his ability to present his defense to the jury.

Recognizing that district courts enjoy substantial latitude in formulating jury instructions, this court reviews the refusal to provide a requested jury instruction for abuse of discretion. *United States v. Smithson,* 49 F.3d 138, 142 (5th Cir. 1995). The district court will not abuse its discretion when it denies a proffered instruction unless this instruction "(1) was a correct statement of the law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the defendant's ability to present a given defense." *Id.*

In this case, the district court did instruct the jurors on good faith. The instruction explained that

> [i]n determining whether or not any defendant acted with criminal intent to defraud or deceive, you may consider whether or not that defendant had a good faith belief that what he was doing was legal. If you have a reasonable doubt as to whether or not a defendant had a good faith belief that was [sic] he was doing was legal, you must acquit that defendant or defendants and say by your verdict 'not guilty.'

The appellants' challenges to this instruction are meritless. This instruction in no way reduces the government's burden of proof beyond a reasonable doubt or thrusts a burden on the appellants. Moreover, the court did not limit its good faith instruction to certain appellants or defenses; rather, the instruction provides that the good faith of *any* appellant may be considered when adjudicating his criminal intent on any charged offense.

Although Billie Mac contends that the district court erred when it refused separately to define either willfulness[16] or specific intent, the court clearly defined "knowingly." Indeed, its definition of this term came from this circuit's pattern jury instructions and provided that "[t]he word 'knowingly' as that term is used in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident." Though the district court did not explicitly define specific intent, it correctly charged the jurors on the element of intent in each offense. Both of Billie Mac's proposed instructions on specific intent merely reiterate that the government must prove beyond a reasonable doubt "that the defendants *knowingly* did an act which the law forbids. . . . " (emphasis added). The effect of the proposed instructions is redundant, and they were unnecessary.

---

[16] In its conspiracy instructions, the court instructed the jury that they must conclude beyond reasonable doubt "[t]hat the defendant knew the unlawful purpose of the agreement and joined in it *willfully, that is with the intent to further the unlawful purpose.*" Hence, while the instructions may have not separately defined willfulness, when read as a whole, they did include such a definition.

In sum, the court's instructions accurately reflected the law and substantially covered the appellants' proffered instructions without impairing the ability of any of the appellants to advance a defense.

C. Joint Motion for Severance

Stanley, Taylor, Sutton, and Novoa contend that the district court abused its discretion when it denied their joint motion for severance. The joint motion was premised on the belief that at a separate trial, Billie Mac would provide exculpatory testimony for the appellants. To support this belief, the appellants submitted *in camera* Billie Mac's affidavit, which stated that he would testify at a separate trial in which he was not a co-defendant. The affidavit also asserted that Billie Mac would testify that, to his knowledge, none of the other appellants had committed any of the charged offenses.

The district court denied the joint motion for severance after conducting a hearing. The court reasoned that Billie Mac's affidavit "falls far short of demonstrating a basis for severance". As the court put it, Billie Mac insisted in his affidavit

> that he acted in good faith in connection with all the financial transactions involved in the indictment, and that he committed no offense. The remainder of his affidavit consists of conclusory statements that his co-Defendants did not conspire with him to commit any offense and that they are innocent of any wrongdoing . . . If he gave the testimony at a severed trial, it would have little evidentiary value.

To allege a prima facie case for severance based on the exculpatory testimony of a co-defendant, a defendant must first show, among other things, that the testimony is truly exculpatory in nature and effect. *United States v. Rocha,* 916 F.2d 219, 232 (5th Cir. 1990), *cert. denied,* 500 U.S. 934, 111 S. Ct. 2057 (1991) (laying out detailed criteria for severance based on 26 codefendant testimony). Billie Mac's affidavit did not fulfill that standard.

The appellants rely on this court's decision in *United States v. Neal,* 27 F.3d 1035 (5th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1165 (1995), to support their claim that severance was improperly denied. In *Neal,* this court held that the district court erred when it denied severance in a drug conspiracy case in which the "undisputed leader of the conspiracy" gave extensive, specific, and exculpatory testimony both by affidavit and *in camera* and would have so testified in a separate trial on behalf of the co-defendants. *Id.* at 1047 & 1047 n.21. Recognizing that "a defendant might suffer prejudice [from a joint trial] if *essential exculpatory evidence* that would be available to a defendant tried alone were unavailable in a joint trial," we vacated the convictions of the co-defendants and remanded for a new trial. *Id.* at 1047 (*citing Zafiro v.*

United States, 506 U.S. 534, 113 S. Ct. 933 (1993)) (emphasis added).

The appellants' reliance on *Neal* is misplaced. In *Neal,* the district court was presented with far more than the conclusory, non-incriminating affidavit offered by Billie Mac; in that case, the defendant gave extensive, specific, and detailed exculpatory testimony. The *Neal* co-defendants suffered specific and compelling prejudice because their trial had not been severed and the testimony never heard. Here, the appellants did not suffer prejudice since the affidavit did not contain any specific exculpatory testimony. *See United States v. Dillman,* 15 F.3d 384 (5th Cir.), *cert. denied,* ___ U.S. ___, 115 S. Ct. 3010 (1992) (no abuse of discretion in denying severance because of the lack of candor reflected in Dillman's affidavit on behalf of his co-defendants and because the "affidavit was in no sense self-incriminatory; it was in fact self-serving. . . . ").

Billie Mac's self-serving, non-incriminating affidavit offered no evidence that would exculpate the other defendants and, like that in *Dillman,* did not justify severance. The district court did not abuse its discretion when it denied this motion.

D. *Gaudin* Error

All of the appellants urge that the Supreme Court's recent decision in *United States v. Gaudin,* ___ U.S. ___, 115 S. Ct. 2310 (1995), requires reversal of their convictions. In *Gaudin,* the Supreme Court held that where materiality is an element of the charged offense, in that case 18 U.S.C. § 1001, the trial court's failure to submit the question of materiality to the jury violates the defendant's Fifth and Sixth Amendment rights. *Id.* at 2320.

In the present case, the district court instructed the jury on Counts 3, 5, 7, and 10, but *not* on Count 1 or 2, that they "need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide." The appellants contend that materiality was an element in each of these counts of conviction and that their constitutional rights were violated when the district court failed to tender to the jury the question of materiality.

The effect of *Gaudin* error, if any, on the multiple verdicts against these defendants is difficult to unravel. Further, the implications of *Gaudin* are subject to dispute. Where materiality is an element of the charged crimes, including § 1344 bank fraud and § 1014 making false statements to a federally insured institution, *Gaudin* may cast doubt on the convictions.

There is a threshold issue, however, whether materiality is an element of the offenses of conspiring to commit bank fraud and aiding and abetting bank fraud.[17]

---

[17] Defendants asserted without dispute by the government in this case that materiality is also an element of the crime of making false entries in bank records with intent to injure or defraud the bank. 18 U.S.C. § 1005. Specifically, Stanley Jobe and Sutton make this point as a vehicle for a *Gaudin* challenge with respect to Counts 4 and 6, which alleged § 1005 violations. There is support in other circuits for this proposition. *See United States v. Rapp*, 871 F.2d 957, 963-64 (11th Cir.), *cert. denied sub nom. Bazarian v. United States*, 493 U.S. 890, 110 S.Ct. 233 (1989). In this

With but little assistance from counsel, the court has uncovered no cases that expressly decide that a conspiracy offense, the gravamen of which is the *agreement* to commit a crime, must incorporate as to all conspirators the elements underlying each substantive offense committed or attempted pursuant to the conspiracy. We will assume *arguendo* that such a predicate is required. The consequence of this assumption is that appellants' Count 1 conspiracy convictions required materiality findings insofar as they rested on substantive § 1014 false statement and § 1344 bank fraud offenses, which have up to now clearly incorporated a materiality element.[18] Likewise, despite counsel's fluctuations on this important question, aiding and abetting crimes like those charged in Count 2 require a finding of the elements of the underlying offense.[19] As appellants Sutton, Taylor, Stanley and

---

circuit, however, materiality is not identified as an element of the offense except for the statement that a material omission of information as well as an actual misstatement qualifies as a false entry. *United States v. Jackson*, 621 U.S. 216, 219 (5th Cir. 1980). For purposes of discussion, we will assume without deciding that materiality is an element of § 1005.

[18] *But see, United States v. Wells*, 63 F.3d 745 (8th Cir. 1995), cert. granted, 116 S.Ct. 1540 (1996).

[19] Under the aiding and abetting statute, 18 U.S.C. § 2, the government, in addition to proving that the elements of the substantive offense occurred, must also prove [the element of aiding and abetting]. *United States v. Hall*, 845 F.2d 1281, 1285 (5th Cir. 1988), *cert. denied sub nom. Hall v. United States*, 488 U.S. 860 *citing United States v. Smith*, 631 F.2d 391, 395 (5th Cir. 1980). *See also United States v. Pedroza*, 78 F.3d 179, 183 (5th Cir. 1996); *United States v. Beuttenmuller*, 29 F.3d 973, 982 (5th Cir. 1996); *United States v. Fischel*, 686 F.2d 1082, 1987-89 (5th Cir. 1982); *United States v. Longoria*, 569 F.2d 422, 425 (5th Cir. 1978).

Novoa were all charged in Count 2 with aiding and abetting Billie Mac's § 1344 bank fraud scheme, it was incumbent on the government to prove that they shared in furthering Billie Mac's material misrepresentations to the banks. In sum, actual or potential materiality elements were present in a number of the charged offenses.

Because, however, appellants did not object to the court's charge at trial, and did not at any point during trial argue that the element of materiality in any of these offenses must be submitted to the jury, our appellate review is confined to plain error analysis. Indeed, nearly every court of appeals that has considered the standard of review of unobjected – go *Gaudin* error has similarly adopted a plain error analysis. *See* Fed. R. Crim. P. 52(b). *See also United States v. Baumgardner,* 85 F.3d 1305, 1308-09 (8th Cir. 1996); *United States v. David,* 83 F.3d 638, 645 (4th Cir. 1996); *United States v. Randazzo,* 80 F.3d 623, 631 (1st Cir. 1996) (assuming the issue arguendo); *petition for cert. filed* (Aug. 20, 1996) (No. 96-294); *and United States v. Keys,* ___ F.3d ___, 1996 WL 512389 (9th Cir. 1996) (en banc) Defendant receives benefit of *Gaudin* "without being held to plain error standards"). This court had issued an inconclusive ruling on the subject in *United States v. McGuire,* 79 F.3d 1396 (5th Cir. 1996), but that opinion was vacated and recently reheard by the *en banc* court and is not controlling. Nor does our opinion in *United States v. Pettigrew,* 77 F.3d 1500, 1510-11 (5th Cir. 1996), establish *Gaudin* error as *per se* reversible. In *Pettigrew,* the United States conceded *"that the district court erred in refusing to submit appellants' requested materiality instruction with respect to the section 1006 counts." 77 F.3d at 1510. Thus,* the *Pettigrew* court's analysis considers only whether such an error can be harmless, the term which applies to appellate review of error that has been preserved by objection at trial. *See* Fed. R. Crim. P. 52(a). *Pettigrew* is distinguishable on its facts.

According to the plain error standard, as articulated by the Supreme Court, this court may only reverse appellants' convictions if (1) there was an error, (2) the error was clear and obvious, and (3) the error affected a defendant's substantial rights. *United States v. Olano,* 507 U.S. 725, 730-31, 113 S. Ct. 1770, 1775-76 (1993). An argument has been made, though not by these defendants, that error can only be "plain" if the action of the trial court was known to be erroneous at the time of trial, hence, defendants may not take advantage of changes that occur in the law after they are tried as a basis for arguing "plain error." *See, e.g., McGuire,* 79 F.3d at 1413 (Smith, J. concurring and dissenting). Our *en banc* court arguably suggested as much in *United States v. Calverley,* 37 F.3d 160, 162-63 (5th Cir. 1994) (en banc), *cert. denied* ___ U.S. ___, 115 S. Ct. 1266. In *Calverley,* however, the error was at least arguable at the time of trial. *Id.* at 165. Here, there was no basis under the law at the time of trial to raise a *Gaudin* objection. *See United States v. Gaudin,* 28 F.3d 943, 955 (9th Cir. 1994) (en banc) (Kozinski, J. dissenting) (all circuits but the Ninth had held that materiality in § 1001 was a matter of law for the court), *aff'd,* ___ U.S. ___, 115 S. Ct. 2310 (1995). As the Fourth Circuit concluded:

> [a]llowing Rule 52(b) [plain error] review where an objection would have been baseless in light of then-existing caselaw, unlike allowing review where the error was merely "unclear" at the time of trial, furthers the substantial interest in

> the orderly administration of justice that underlies the contemporaneous objection rule.

David, 83 F.3d at 644. Allowing plain error review when an objection would have been baseless under then-current law does not countenance the sandbagging that the contemporaneous objection rule is designed to prevent, while denying plain error review in that situation would encourage frivolous objections by defense attorneys trying to preserve error based on every conceivable future change in the law. *Id.* at 645. In the interest of maintaining uniformity with the other circuits, we now adopt their formulation that permits defendants to assert plain error based on intervening changes in the law.[20]

Application of the *Olano* plain error standard does not, however, necessarily require reversal of these convictions. The third prong of the *Olano* test requires that the error must have affected the substantial rights of the appellants. And even if that is so, the Supreme Court explained that an appellate court need not exercise discretion to correct the error unless it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Olano,* 507 U.S. at 734-36, 113 S. Ct. at 1778.

Reviewing all of the above-listed counts of conviction in light of these standards, we conclude that although plain error was committed with respect to the defective jury instructions, and assuming without deciding that the errors affected appellants' substantial rights, it is not necessary to overturn the convictions. Substantial government resources have been expended on these cases to date. The appellants succeeded in defending themselves against some counts (e.g. money laundering), while on those before us, the incriminating evidence, although often circumstantial, is overwhelming. The materiality of the false entries, false representations, and amounts of money involved in the expanded check kiting scheme were never seriously contested by the defendants at trial. The paucity of record references to materiality is telling. On this record, there is simply no reasonable likelihood that the appellants were prejudiced by the failure to instruct on materiality. We do not feel compelled to order a new trial in the exercise of our considered discretion under *Olano*.

---

[20] *See United States v. Kramer,* 73 F.3d 1067, 1074 n.16 (11th Cir. 1996); *United States v. Retos,* 25 F.3d 1220, 1230 (3d Cir. 1994); *United States v. Jones,* 21 F.3d 165, 172-73 (7th Cir. 1994); *David,* 83 F.3d at 644-45; and *United States v. Viola,* 35 F.3d 37, 42 (2d Cir. 1994).

E. Joint Sufficiency of Evidence Challenges – Count 1 and Count 2

Having declined to exercise our discretion to correct any alleged *Gaudin* error in Count 1, the only remaining challenge to the convictions for conspiracy to commit bank fraud suggests that the evidence against Novoa, Taylor, and Stanley Jobe is insufficient to support these convictions. In order to establish a conspiracy under 18 U.S.C. § 371, the government must prove beyond a reasonable doubt the existence of an agreement between two or more people to violate a law of the United States and that any one of the conspirators committed an overt act in furtherance of that agreement. *See, e.g., United States v. Faulkner,* 17 F.3d 745, 768 (5th Cir. 1994), *cert. denied,* ___ U.S. ___, 115 S. Ct. 193 (1994); *United States v. Chaney,* 964 F.2d 437, 449 (5th Cir. 1992). The government must also prove that the defendant knew of the conspiracy and voluntarily participated in it. *Chaney,* 964 F.2d at 449.

Given the extensive evidence in this case, the challenges raised by Novoa, Taylor, and Stanley Jobe to the sufficiency of the evidence supporting their convictions is thoroughly meritless. The standard which guides this court's review is whether, viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the government, a "reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." *United States v. Mergerson,* 4 F.3d 337, 341 (5th Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S. Ct. 1310 (1994). We have above described the extensive evidence supporting the convictions of Novoa, Taylor, and Stanley Jobe. From all of the evidence and testimony presented to the jury in this case, a rational trier of fact could easily have decided that Novoa, Taylor, and Stanley Jobe conspired to commit bank fraud with Billie Mac. Put differently, a rational jury could have concluded that Novoa, Taylor, and Stanley Jobe were knowing, voluntary participants in an agreement to commit bank fraud and that overt acts were committed in furtherance of that agreement; their convictions under Count 1 are affirmed.[21]

---

[21] Novoa asserts particularly that, pursuant to *Ingram v. United States,* 360 U.S. 672 (1959), the government did not prove that he shared Billie Mac's intent to defraud the bank, a requirement of his conspiracy and aiding and abetting convictions. We disagree. Novoa was in charge of the wire room and accounting for EPSB. His underlings figured out that Billie

To aid and abet an offense, as charged in Count 2, the appellants must share in the criminal intent of the principal and assist the principal's perpetration of a crime. Sutton, Taylor, Novoa and Stanley argue that the government did not prove "beyond a reasonable doubt that the defendant[s] willingly associated [themselves] with a criminal venture and participated therein as something [they] wanted to bring about." *United States v. Cloud,* 872 F.2d 846, at 850 (9th Cir. 1989). From all of the evidence and testimony presented to the jury in this case, however, a rational trier of fact could have decided that the appellants aided and abetted Billie Mac's bank fraud. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). The jury could have rationally concluded that these appellants had an intent to defraud the banks by facilitating Billie Mac's bank fraud. In *United States v. Knipp,* 963 F.2d 839, 846 (6th Cir. 1992), the Sixth Circuit affirmed the defendant's aiding and abetting bank fraud conviction where the defendant "allowed . . . [the] overdrafts to continue and that he facilitated the kite to cover them because the overdrafts amounted to huge, unauthorized loans beyond the single customer legal lending limits. . . ." The evidence in the instant case demonstrates that the remaining appellants facilitated Billie Mac's kite in similar and, indeed, more extensive ways. *See also, United States v. Sims,* 895 F.2d 326 (7th Cir. 1990) (finding that the defendant acted with the intent to defraud was sufficient to sustain his conviction for aiding and abetting attempts

---

Mac's actions looked like check kiting. Novoa personally continued to approve many of the transactions. He eventually took a job with Billie Mac. The jury was entitled to infer his guilty intent and the other elements of the crimes.

to commit a wire fraud against a bank). Accordingly, the Count 2 convictions must be affirmed against these appellants.

F. Making False Bank Entries: Count 16

Taylor was convicted of making materially false bank entries in the records of El Paso State Bank under Count 16. Specifically, Count 16 alleged that on December 29, 1989, Taylor signed and issued a cashier's check for over $3,500,000 to Billie Mac Jobe, yet failed to disclose and detail this transaction in EPSB records until several days later on January 4, 1990. After examining the record and evidence in the light most favorable to the government, we conclude that the evidence supports Taylor's conviction. His argument to the contrary is meritless.

G. Making False Statements on a Loan Application and Aiding and Abetting the Same Offense: Counts 5 and 6

Stanley Jobe was convicted under Counts 5 and 6 of making false statements on a loan application, in violation of 18 U.S.C. § 1014, and of aiding and abetting Philip Sutton to make false statements on the same application. Stanley argues insufficient evidence. In these instances, we agree with the contention. To prove a violation of 18 U.S.C. § 1014, the government must demonstrate beyond a reasonable doubt that "(1) the defendant made a false statement to a financial institution; (2) the defendant made the false statement knowingly; (3) he did so for the purpose of influencing the financial institution's action; and (4) the statement was false as to a material fact."

United States v. Thompson, 811 F.2d 841, 844 (5th Cir. 1987). Stanley is also charged in Count 6 with aiding and abetting Philip Sutton to make false entries in the bank records concerning the same application, which was made, as the indictment charges, "by Stanley Pruet Jobe." After reviewing the evidence and the reasonable inferences therefrom in the light most favorable to the government, this court concludes that the government has failed to prove that Stanley Jobe made a false statement to a financial institution or that he made a loan application concerning the Deer Creek Spice loan. As a result, Stanley Jobe's convictions are not supported by sufficient evidence.

Under Counts 5 and 6, the government's theory of false statement and aiding and abetting is that Stanley Jobe misrepresented that the purpose of the Deer Creek Spice loan was to finance the acquisition of inventory. The government further suggests that this intentional misrepresentation was entered on a "loan application" made by Stanley Jobe at CNB, dated May 18, 1990. CNB was allegedly influenced by the false statement because this statement was relied upon by bank officers in the bank's loan approval committee. Under the government's theory and indictment of Counts 5 and 6, because Stanley Jobe knowingly misrepresented the purpose of the loan and also aided and abetted Philip Sutton in making material false bank entries at CNB, he is guilty. The record does not, however, support the government's assertion that Stanley Jobe made a false statement on a loan application at CNB or communicated with Philip Sutton in any way to assist Sutton in making false bank records concerning the loan. It is undisputed that Stanley made no direct representations concerning the loan.[22] He was neither the borrower nor the payee of the proceeds, although he was a guarantor. Moreover, Stanley Jobe did not sign any loan application at CNB on May 18, 1990;[23] in fact, there was no formal loan application whatsoever, but rather a loan presentation form that was compiled by CNB employees and used by Sutton but unsigned by Stanley. At no time during trial did the government introduce into evidence a loan application on which Stanley Jobe made a false statement. Because the government's evidence at trial was insufficient to allow a reasonable juror to conclude that Stanley made false statements on a loan application or aided and abetted Sutton, his Counts 5 and 6 convictions are reversed.

II. Appellants' Individual Challenges to their Convictions

A. Stanley's Challenges to the Sentence Enhancements

The district court imposed two different sentence enhancements on Stanley. The first of these is a two-level enhancement imposed under U.S.S.G. § 3B1.1(c) for Stanley's supposed efforts as a manager or supervisor of criminal activity.

---

[22] The record demonstrates that bank examiners investigating this loan at CNB did not suspect Stanley Jobe of criminal activity.

[23] The promissory note was actually signed by Frank Owen.

Stanley argues that the district court clearly erred when it imposed this enhancement on him because there was no evidence to support the requisite finding under § 3B1.1(c) that he managed or supervised criminal activity. Moreover, the Presentence Report ("PSR"), on which the district court relied, incorrectly concludes that his position as a director of two of the banks involved in the kiting scheme demonstrates that he managed or supervised the criminal activity.

As this court has frequently explained, the decision to enhance a sentencing guideline will be upheld if it "results from a legally correct application of the Guidelines to factual findings that are not clearly erroneous." *United States v. Sherrod,* 964 F.2d 1501, 1506 (5th Cir. 1992), *cert. denied, sub. nom, Cooper v. United States,* ___ U.S. ___, 113 S. Ct. 832 (1992). Also, a PSR "generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the guidelines." *United States v. Elwood,* 999 F.2d 814, 817 (5th Cir. 1993).

Nevertheless, a thorough review of the record lends no support to the district court's finding that Stanley somehow managed or supervised the criminal activity. According to *United States v. Ronning,* 47 F.3d 710, 711-12 (5th Cir. 1995), § 3B1.1(c) requires that a defendant be the organizer of [sic] leader of at least one other participant in the crime and that he assert control or influence over at least that one participant.[24] There is no evidence that Stanley managed or supervised any of his codefendants or any other people in connection with the illegal acts. Absent such evidence, this court must vacate his sentencing enhancement under § 3B1.1(c).

---

[24] This is the requirement under § 3B1.1(c) for enhancing Stanley's sentence. As will be discussed later, however, this

The second sentence enhancement imposed on Stanley is not as problematic. Under that enhancement, the district court increased Stanley's offense level two levels because it found that he had "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense. . . . " § 3B1.3. This provision

> encompasses two factors: (1) whether the defendant occupies a position of trust and (2) whether the defendant abused her position in a manner that significantly facilitated the commission or concealment of the offense. To determine whether the position of trust "significantly facilitated" the commission of the offense, the court must decide whether the defendant occupied a superior position, relative to all people in a position to commit the offense, as a result of her job.

United States v. Fisher, 7 F.3d 69, 70-71 (5th Cir. 1993).

Stanley raises a litany of challenges to this enhancement. For instance, he contends that his ordinary, commercial relationships with the lenders were not trust relationships; that, although he did have a position of trust with two of the banks involved, he did not use this

---

enhancement is also applicable if the defendant exercised "management responsibility over the property, assets, or activities of a criminal organization." *See USSG* § 3B1.1(c), comment., n.2.

position to further his father's activities; that his acquisition of a loan was not an abuse of trust; that the Deer Creek Spice loan was from CNB where he occupied no position of trust; and that mere knowledge of his father's activities did not constitute an abuse of trust. While the record is admittedly close on this issue, Stanley's PSR found that Stanley was present at an EPSB meeting with bank examiners in early 1991 and was advised at this meeting of his father's check kiting scheme. Also, he was apprised of Billie Mac's overdrafts that had been covered by wire transfers on the Jobe Concrete Products account at FNPB. As discussed earlier, Stanley was on the board of directors at both EPSB and FNPB. Hence, there is some evidence to support the district court's finding that Stanley occupied positions of trust at both banks and used these positions to facilitate or conceal his father's check kiting scheme. Given this evidence, sentence enhancement under § 3B1.3 for abuse of trust was not clearly erroneous.

B. Novoa's Separate Challenges

1. *Bruton* Claims

Novoa contends that the district court improperly denied his motion to sever, violating his Sixth Amendment right to confrontation as this right was explained by the Supreme Court in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968). This court has interpreted *Bruton* to provide that a defendant's Sixth Amendment right to confrontation is violated when "(1) several co-defendants are tried jointly, (2) one defendant's extrajudicial statement is used to implicate another defendant in the crime, and (3) the confessor does not take the stand and is thus not subject to cross-examination." *United States v. Restrepo,* 994 F.2d 173, 186 (5th Cir. 1993). *Bruton* can be violated when a co-defendant's statement "directly alludes to the complaining defendant." *United States v. Beaumont,* 972 F.2d 91, 95 (5th Cir. 1992) (*quoting United States v. Webster,* 734 F.2d 1048, 1054 n.6 (5th Cir. 1984), *cert. denied, sub. nom, Hoskins v. United States,* 469 U.S. 1073, 105 S. Ct. 565 (1984)). However, severance is proper only in cases where a "defendant's statement *directly incriminates* his or her co-defendants *without reference to other, admissible evidence." Id.* (emphasis added).

Novoa argues that the admission of certain statements by Taylor, through bank examiner Burress, and statements by Billie Mac, through Hale, the credit manager and vice-president of Jobe Concrete Products, violated his Sixth Amendment right to confront witnesses.[25] Neither Taylor nor Billie Mac testified at trial.

The first statement to which Novoa objects under *Bruton* was a statement by Taylor made through bank examiner Burress. At trial, Burress testified as follows:

> Mr. Taylor indicated that on December 29th, the date that check was issued, the cashier, Fernando Novoa, presented him with a check. . . .
>
> That Fernando Novoa presented the check for him to sign. Mr. Taylor signed the check without verifying that there [sic] collected funds in the account sufficient to pay for the check. His

---

[25] Both of these statements were highlighted and noted in our earlier discussion of the factual background.

> stated reason was that he had faith in the cashier that that was okay. . . .
>
> Next, he indicated he asked – When he was told that the transaction was illegal, he asked cashier Fernando . . . Novoa what happened, what was the reason for this, and he did not get an answer. . . .
>
> Stephen Taylor indicated that he felt like Fernando Novoa had some checks in his drawer that were written by Billie Mac Jobe until January 4th, the date that the cashier's check was paid for.[26]

Prior to this testimony, Novoa's counsel objected that the testimony was not admissible as an exception to the hearsay rule under Fed. R. Evid. 801(d)(2)(E).[27] The trial judge then asked Novoa's counsel whether he was asking that the statement not be considered against his client, and Novoa's counsel responded, "Absolutely." The district court then issued a limiting instruction to the jury that it must consider this testimony only as to Taylor.

Novoa correctly contends that the district court's limiting instruction in this case was powerless to rectify an actual *Bruton* error. *Cruz v. New York,* 481 U.S. 186, 190, 107 S. Ct. 1714, 1717-18 (1987). Hence, if the admission of Taylor's statements through Burress violated *Bruton,* the district court's limiting instruction was ineffective.

---

[26] As was noted earlier, Taylor retracted this allegation in a subsequent conversation with Burress.

[27] Novoa had, of course, also moved for severance prior to trial.

But Taylor's statements did not violate Novoa's Sixth Amendment right to confront witnesses as this right was explained in *Bruton*. The statements did not directly incriminate Novoa without reference to other admissible evidence. *See Beaumont,* 972 F.2d at 95. The only potentially incriminating statement by Taylor suggested that Novoa kept Billie Mac's checks in his drawer until the date on which the cashier's check was paid.[28] At best, this statement was a tentative opinion by Taylor, one that he later retracted; Burress' testimony included Taylor's retraction of his statement. Taken as a whole, none of Taylor's statements through Burress directly incriminated Novoa, so these statements did not run afoul of *Bruton*.

Furthermore, because the statements did not directly incriminate Novoa without reference to other admissible evidence, the court's limiting instruction is adequate to protect Novoa from any potential prejudice. As this court recently explained in *United States v. Leal,* ___ F.3d ___, 1996 WL 30673, *5 (5th Cir. 1996),

> [t]he Supreme Court has held that the admission of a nontestifying defendant's confession is permissible if the trial court gives a proper limiting instruction. *Marsh v. Richardson,* 481 U.S. 200, 107 S. Ct. 1702 (1987). This Court has held that a *Bruton* problem arises *only when the statements*

---

[28] Although Novoa suggests that Taylor's statements also accuse Novoa of having dishonestly orchestrated an 'illegal' insufficient cashier's check transaction for Jobe, there is no support for this in the record. At most, Taylor suggests that Novoa could not explain why the cashier's check was not posted on bank records for several days. This in no way directly incriminates Novoa.

> *clearly implicate the codefendant. United States v. Kelly,* 973 F.2d 1145 (5th Cir. 1992). Furthermore, even if a *Bruton* violation occurs, 'the error may be harmless if the statement's impact is insignificant in light of the weight of other evidence against the defendant.'

(citation omitted) (emphasis added). In *Leal,* as in the instant case, the proffered statements did not clearly implicate the codefendant and since "[t]here was no direct implication . . . the limiting instruction was adequate to prevent prejudice." *Id.* Given both the nature of the proffered statements and the court's limiting instruction, this court concluded in *Leal* as we do now, that "[t]he district court acted well within its discretion in denying the motion to sever trials." *Id.*

The second statement to which Novoa objects was a statement by Billie Mac through Hale. At trial, Hale testified as follows:

> I'm uncertain as to the time, but I did have a conversation with Mr. Jobe about deposit slips at El Paso State Bank. . . .
>
> He told me that he was receiving immediate credit via deposit slips that have been encoded to provide that. . . .
>
> [By "encoded"] I believe he was referring to the micro encoding at the bottom of the deposit slips. . . .
>
> Fernando Novoa [was the person at El Paso State Bank who 'had worked it' so that he could receive immediate credit with the encoding]. . . .

Careful review of the record demonstrates that Novoa did not object to this testimony.[29]

Although this testimony is admittedly incriminating to Novoa and might raise *Bruton* concerns, as has been previously explained, because Novoa failed to object to this testimony, this court will review for plain error. After carefully considering the underlying record, this court declines to exercise its discretion to correct whatever *Bruton* error this testimony might contain. Even if this court were to grant Novoa's objection to the statements of Billie Mac through Hale and strike these statements from the record, the evidence is nonetheless more than sufficient to affirm Novoa's conviction sentences under Counts 1 and 2 for aiding and abetting bank fraud. Given the other, admissible evidence against Novoa, any *Bruton* error would be harmless, so this court's refusal to rectify it through plain error review does not cause a miscarriage of justice. *See, e.g., U.S. v. Kelly,* 973 F.2d 1145 (5th Cir. 1992) (applying harmless error analysis to an alleged *Bruton* error); *U.S. v. Cartwright,* 6 F.3d 294, 300 (5th Cir. 1993) (holding that no plain *Bruton* error occurred when the evidence of guilt was overwhelming).

---

[29] Earlier in the testimony, Novoa had objected that the government's question inquiring about a period of time, "[b]efore Fernando Novoa came to work for Mr. Billie Mac Jobe and his entities," assumed facts not yet in evidence, but this objection did not relate to the testimony about which Novoa alleges *Bruton* error; no objection was raised to that testimony.

2. Sentence Enhancements

Novoa contends that the district court erred in applying a two level enhancement under § 3B1.1(c) discussed above because he did not manage or supervise any other criminal participant in the check-kiting scheme. He also argues that the district court was clearly erroneous when it refused to grant him a reduction in sentence under § 3B1.2 for his status as a minimal or minor participant in the check kite. On the first point, Novoa is correct.

To support his argument that the § 3B1.1(c) enhancement was erroneous, Novoa relies on the language in the commentary accompanying that section that indicates that he must supervise, manage, or control another co-defendant in order to qualify for the enhancement. However, as this court explicitly recognized in *Ronning*, "[t]he note recognizes an exception to the control requirement if a defendant exercises management responsibility over a criminal organization's property, assets, or activities." *Ronning*, 47 F.3d at 711. Indeed, the note expressly provides that

> [a]n upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

USSG § 3B1.1(c), comment., n.2.

As the district court did not order an upward departure, this ground of enhancement is unavailable to sustain the enhancement on appeal. Further, the record contains no evidence, required by *Ronning*, that Novoa managed or supervised any of his codefendants in connection with the illegal check kite. We must vacate this adjustment and remand for resentencing.[30]

Novoa also claims that the district court was clearly erroneous when it failed to grant him a sentence reduction under § 3B1.2. This section provides that

> [b]ased on the defendant's role in the offense, decrease the offense level as follows: (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels; (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels. In cases falling between (a) and (b), decrease by 3 levels.

USSG § 3B1.2. On appeal, Novoa claims that he was entitled to a two-level downward adjustment as a "minor participant." The government counters that Novoa has waived this claim since he argued at sentencing for a four-level downward adjustment for his role as a "minimal participant."

The record supports the government's claim that Novoa sought the four-level downward adjustment at sentencing rather than the two-level reduction given to a "minor participant." While this court could conclude that Novoa has waived his claim for treatment as a "minor participant," the district court's denial of this two-level reduction was nonetheless proper because there was ample evidence in the record to support the conclusion that Novoa was more than a minor participant in Billie Mac's check kiting scheme.

---

[30] This decision is without prejudice to the possibility that an upward departure for Novoa's "management responsibility" over the assets involved in check kiting might be warranted.

CONCLUSION

For the foregoing reasons, this court AFFIRMS all but two of the convictions of all the appellants, VACATES only Stanley's convictions on Count 5 and Count 6, VACATES Stanley's and Novoa's managerial or supervisory sentencing enhancements, and REMANDS Stanley and Novoa for resentencing. All other points raised on petitions for rehearing are DENIED.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 94-50646

United States of America,

Plaintiffs-Appellee,

versus

Billie Mac Jobe, Stephen Taylor, Philip Mark Sutton, Stanley Pruet Jobe, and Fernando Novoa,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

(Filed Jul. 24, 1996)

Before JONES and STEWART,* Circuit Judges.

EDITH H. JONES, Circuit Judge:

In their petition for rehearing, the appellants Billie Mac Jobe ("Billie Mac"), Stanley Pruet Jobe ("Stanley"), Stephen Taylor, Philip Mark Sutton, and Fernando Novoa raise a number of issues, some of which require further analysis by this court. Specifically, the Supreme Court's holding in *Ray v. United States,* 481 U.S. 736, 107 S. Ct. 2093 (1987) prevents this court from invoking its concurrent sentence doctrine when a $50 special assessment is imposed on each count of conviction.[1] As a result, this court's original opinion, *United States v. Jobe*, 77 F.3d 1461 (5th Cir. 1996), is hereby amended as follows. After carefully considering all of the challenges raised by the appellants and the underlying record, this court AFFIRMS all remaining convictions, except that it REVERSES Stanley's conviction as charged in Count 5 for making false statements on a loan application, and REMANDS Novoa for resentencing.[2]

---

* Like the panel opinion, this amendment is issued by a quorum.

DISCUSSION

I. Conspiracy to Commit Bank Fraud: Count 1

All of the defendants were convicted under Count 1 of conspiring to commit bank fraud in violation of 18

---

[1] See also 18 U.S.C. § 3013 (providing that district courts shall assess a monetary charge "on any person convicted of an offense against the United States.").

[2] The practical impact of this court's opinion on rehearing will be negligible as each count of conviction supports precisely the same prison sentence. Because the government can collect $50 on each count from each of the appellants, however, *Ray* requires that this court address convictions that, even if reversed, would have no impact on the prison term of any of the appellants. We echo the concerns recently articulated by Judge Easterbrook for the wisdom of such a requirement:

> But here we are: the prosecution has invested tens of thousands of dollars to obtain the conspiracy convictions . . . and now we are grappling with some thorny issues to determine whether the $50 assessments stand. All to what end? . . . So we trudge on, but with grave doubt the public resources have been wisely deployed.

United States v. Duff, 76 F.3d 122, 124 (7th Cir. 1996).

U.S.C. §§ 1344, 1005, 1014, and 371. All of the defendants urge that their convictions under Count 1 must be reversed because the district court neglected to instruct the jury that materiality was an element of the offense of conspiracy and that, as a result, their constitutional rights were violated when the district court failed to tender this issue to the jury.[3] Further, three of the defendants, Novoa, Taylor, and Stanley Jobe, contend that their convictions under Count 1 must also be reversed for lack of sufficient evidence. Upon close examination, neither of these arguments has any merit nor requires reversal of the Count 1 convictions.

All of the appellants contend that the Supreme Court's recent decision in *United States v. Gaudin*, ___ U.S. ___, 115 S. Ct. 2310 (1995), requires reversal of their convictions under Count 1. In *Gaudin*, the Supreme Court explained that where materiality is an element of the charged offense, the district court's failure to submit the question of materiality to the jury violates the defendant's Fifth and Sixth Amendment rights. Id. at ___, 115 S. Ct. at 2320. Although they cite no controlling precedent, the appellants suggest that materiality is an element of their convictions for conspiring to commit bank fraud. Because the jury was not explicitly instructed to determine the question of materiality under Count 1, the appellants conclude that after *Gaudin,* their convictions under Count 1 must be reversed.

---

[3] The district court instructed the jury on Counts 3, 5, 7, and 10, but not on Count 1, that they "need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide."

As this court explained in our original opinion, the effect of the *Gaudin* error, if any, on the multiple verdicts against these defendants is difficult to identify. For instance, the threshold inquiry whether materiality is an element of the convictions for conspiracy to commit bank fraud is subject to dispute. While bank fraud does require a finding of materiality as an element of that offense, *see, e.g., United States v. Spears,* 49 F.3d 1136, 1141 (6th Cir. 1995); *United States v. Davis,* 989 F.2d 244, 247 (7th Cir. 1993), the parties cite no caselaw expressly deciding whether materiality is likewise an element of the offense of conspiring to commit bank fraud.[4]

However, as previously noted, Count 1 charged each of the defendants with conspiracy to commit bank fraud in violation of 18 U.S.C. §§ 1344, 1005, 1014, and 371. Section 371 is the general conspiracy statute, prohibiting any conspiracy to commit an offense against the United States or to defraud it. The other statutes referenced in Count 1, if prosecuted as independent offenses, would require the government to prove and the jury to find materiality. Section 1005, for instance, prohibits the making of false entries in any book, report, or statement of a federally insured bank with the intent to injure or defraud the bank. Materiality is an element of that offense. *See, e.g., United States v. Jackson,* 621 F.2d 216, 219 (5th Cir. 1980); *United States v. Rapp,* 871 F.2d 957, 963-64

---

[4] This court's own extensive search of the caselaw has also failed to identify such an authority.

(11th Cir. 1989), *cert. denied, sub. nom., Bazarian v. United States*, 493 U.S. 890, 110 S. Ct. 233 (1989). Section 1344, the statutory prohibition against bank fraud and, as discussed above, § 1014, which criminalizes the knowing use of false statements in loan applications to federally insured banks, both require material false statements. *See, e.g., United States v. Kelley*, 615 F.2d 378, 380 (5th Cir. 1980); *Rapp*, 871 F.2d at 964.

Given this statutory framework, while it is likely that the offense of conspiracy to commit bank fraud would also require the government to prove materiality, this court need not resolve that issue. Critically, none of the appellants objected at trial to the district court's failure to instruct the jury on materiality in Count 1 or in any other count. As a result, this court reviews the *Gaudin* claim of the appellants for plain error. *See, e.g., United States v. Randazzo*, 80 F.3d 623 (1st Cir. 1996); *United States v. DiDomenico*, 78 F.3d 294 (7th Cir. 1996); *United States v. Kramer*, 73 F.3d 1067 (11th Cir. 1996); *United States v. Keys*, 67 F.3d 801 (9th Cir. 1995), *reh'g en banc granted*, 78 F.3d 465 (9th Cir. 1996). Under plain error review, before this court can even consider reversing the appellants' convictions, the appellants must demonstrate that (1) there was an error; (2) it was clear or obvious; and that (3) this error affected their substantial rights. *United States v. Calverley*, 37 F.3d 160, 162-64 (5th Cir. 1994) (*en banc*) (*citing United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 1776-79 (1993)), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1266 (1995). Even if the appellants satisfy this burden, the Supreme Court has explained that this court need not exercise its discretion to correct the error unless it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 507 U.S. at ___, 113 S. Ct. at 1778. Hence, as this court detailed in its original opinion, even if we assume that *Gaudin* error was plain because it became so after the trial and only on appeal, and even if we assume that the failure to instruct the jury on materiality was a "structural error" such that the appellants are not required to show prejudice, *see Keys, supra*, 67 F.3d at 810-11, we may still decline to exercise discretion to reverse the convictions. As noted in the previous opinion, this court thoroughly considered the record and the overwhelming evidence adduced by the government at trial. Although much of the evidence is circumstantial as to the existence of a conspiracy, it is more than sufficient to support the convictions under Count 1. The fact that none of the appellants seriously contested the materiality of false statements or entries, moreover, strongly suggests that materiality was indisputable. Consistent with our previous determination regarding Count 2, this court declines to exercise discretion to correct for the appellants the alleged *Gaudin* error on Count 1 by reversing their convictions. This result does not effect a fundamental miscarriage of justice.

Having declined to exercise our discretion to correct any alleged *Gaudin* error in Count 1, the only remaining challenge to the convictions for conspiracy to commit bank fraud suggests that the evidence against Novoa, Taylor, and Stanley Jobe is insufficient to support these convictions. In order to establish a conspiracy under 18 U.S.C. § 371, the government must prove beyond a reasonable doubt the existence of an agreement between two or more people to violate a law of the United States and that any one of the conspirators committed an overt act in furtherance of that agreement. *See, e.g., United States v. Faulkner,* 17 F.3d 745, 768 (5th Cir. 1994), *cert. denied,* ___ U.S. ___, 115 S. Ct. 193 (1994); *United States v. Chaney,* 964 F.2d 437, 449 (5th Cir. 1992). The government must also prove that the defendant knew of the conspiracy and voluntarily participated in it. *Chaney,* 964 F.2d at 449.

Given this burden and the extensive evidence in this case, the challenge raised by Novoa, Taylor, and Stanley Jobe to the sufficiency of the evidence supporting their convictions is meritless. The standard of review is whether, viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the government, a "reasonable trier of fact could have found that the evidence established guilt beyond a reasonable doubt." *United States v. Mergerson,* 4 F.3d 337, 341 (5th Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S. Ct. 1310 (1994). This court's original opinion carefully details the extensive evidence supporting the convictions of Novoa, Taylor, and Stanley Jobe. From all of the evidence and testimony presented to the jury in this case, a rational trier of fact could easily have decided that Novoa, Taylor, and Stanley Jobe conspired to commit bank fraud. Put differently, a rational jury could have concluded that Novoa, Taylor, and Stanley Jobe were knowing, voluntary participants in an agreement to commit bank fraud and that overt acts were committed in furtherance of that agreement; their convictions under Count 1 are affirmed.

II. Making False Bank Entries: Counts 4, 6, and 16

The jury convicted Sutton under Counts 4 and 6 of making false bank entries. Taylor was also convicted of a similar offense under Count 16. Finally, Stanley Jobe was convicted under Count 6 of aiding and abetting the making of a false bank entry. The three appellants raise two broad challenges to their convictions: the first, a *Gaudin* claim; the second, a challenge to the sufficiency of the evidence underlying the jury's verdicts. Specifically, Sutton raises a *Gaudin* challenge to his convictions under Counts 4 and 6, and Stanley Jobe echoes this challenge to his conviction under Count 6. Taylor argues that there was insufficient evidence to sustain his conviction under Count 16, while Stanley Jobe similarly challenges the sufficiency of the evidence for his Count 6 conviction.

Count 4 charges that Sutton made false entries in the books, reports, and statements of Continental National Bank ("CNB") with the intent to deceive the national bank examiners, in violation of 18 U.S.C. §§ 1005 and 2. Count 6 makes similar allegations under the same statutes, charging that Sutton made a material false entry with regard to the Deer Creek Spice loan in the records of Continental National Bank and that this entry was aided and abetted by Stanley Jobe. As discussed earlier, materiality is an element of the offense proscribed by § 1005. *See, e.g., Jackson,* 621 F.2d at 219; *Rapp,* 871 F.2d at 963-64 (1989).[5] By contrast, § 2 simply provides in relevant part that those who aid or abet an offense against the United States will be criminally liable as principals. As this court explained in its original opinion in this case, materiality is not a prerequisite to convictions for aiding and abetting under § 2. *See Jobe,* 77 F.3d at 1475 (although bank fraud requires materiality, aiding and abetting bank fraud has no such requirement).

---

[5] The language of the indictment in both Counts 4 and 6 also charges that the false entries were material.

Because § 1005 requires the government to prove materiality, Sutton's *Gaudin* challenge is the sole plausible constitutional attack on his convictions for Counts 4 and 6, and since neither Sutton nor any of the other appellants objected at trial to the district court's failure to instruct the jury on materiality in Counts 4 and 6, the attack is limited to plain error. Sutton has never questioned the sufficiency of the evidence to support these convictions. We decline to grant relief to Sutton for the *Gaudin* error.

But Stanley Jobe challenges Count 6 for *Gaudin* plain error and on the additional ground that there is insufficient evidence to support his conviction for aiding and abetting the making of a materially false bank entry. After reviewing the evidence and all of its reasonable inferences in the light most favorable to the government, we are persuaded that a reasonable jury could have concluded that Stanley Jobe aided and abetted the making of a materially false bank entry at CNB. Though we need not recount the evidence adduced at trial,[6] the jury could have reasonably concluded that Stanley Jobe had aided and abetted the making of the materially false statement in CNB records that the purpose of the Deer Creek Spice loan was to finance the acquisition of inventory; hence, his conviction under Count 6 is supported by sufficient evidence. The strength of the evidence that Stanley assisted his father and Sutton in procuring the Deer

---

[6] This court's original opinion contains a thorough summary of the evidence and testimony at trial.

Creek Spice loan under false pretenses persuades us that appellate discretion need not be exercised to correct the lack of a materiality charge.

The sole, remaining challenge to a false entry conviction is raised by Taylor, who urges that his conviction under Count 16 is not supported by sufficient evidence. Count 16 alleged that on December 29, 1989, Taylor signed and issued a cashier's check for over $3,500,000 to Billie Mac Jobe, yet failed to disclose and detail this transaction in El Paso State Bank records until several days later on January 4, 1990. The trial was replete with evidence supporting Taylor's conviction under Count 16 and after examining the record and evidence in the light most favorable to the government, this court affirms the conviction as a reasonable trier of fact could have concluded that Taylor made a materially false entry in the EPSB records.

III. Making False Statements on a Loan Application: Count 5

Stanley Jobe was the sole defendant convicted by the jury under Count 5 of making false statements on a loan application, in violation of 18 U.S.C. § 1014. Stanley Jobe attacks his conviction under Count 5, contending that it is infirm both because of *Gaudin* error and because it is plagued by insufficient evidence.

To prove a violation of 18 U.S.C. § 1014, the government must demonstrate beyond a reasonable doubt that "(1) the defendant made a false statement to a financial institution; (2) the defendant made the false statement knowingly; (3) he did so for the purpose of influencing the financial institution's action; and (4) the statement was false as to a material fact." *United States v. Thompson,* 811 F.2d 841, 844 (5th Cir. 1987). Even viewing the evidence in the light most favorable to the government, Stanley Jobe's conviction for making a false statement on a loan application is not supported by sufficient evidence.

Under Count 5, the government's theory of false statement is that Stanley Jobe misrepresented that the purpose of the Deer Creek Spice loan was to finance the acquisition of inventory, when its real purpose was to Billie Mac's overdrawn account. The government further suggests that this intentional misrepresentation was entered on a loan application made by Stanley Jobe at CNB, dated May 18, 1990. CNB was allegedly influenced by the false statement, which was relied upon by bank officers in the bank's loan approval committee.

But the record does not support the government's assertion that Stanley Jobe made a false statement on a loan application at CNB. In fact, it is undisputed that Stanley made no direct representations concerning the loan.[7] He was neither the borrower nor the payee of the proceeds, although he was a guarantor. Moreover, Stanley Jobe did not sign any loan application at CNB on May 18, 1990; in fact, there was no loan application whatsoever, but only a loan presentation form that was compiled by CNB employees and unsigned by Stanley. The promissory note was actually signed by Frank Owen. At no time during trial did the government introduce into evidence a loan application on which Stanley Jobe made a false statement. The government never offered testimony that Stanley directly caused a bank officer or anyone else to place false information on the loan application. Because the government's evidence at trial was insufficient to allow a reasonable juror to conclude that Stanley was guilty of making false statements on a loan application, his Count 5 conviction is reversed.[8]

---

[7] The record demonstrates that bank examiners investigating this loan at CNB did not suspect Stanley Jobe of criminal activity.

IV. Novoa's Sentence Enhancements

On rehearing, Novoa again urges that the district court erred in applying a two level enhancement under § 3B1.1(c) because he did not manage or supervise any other criminal participant in the check-kiting scheme. Novoa relies on the language in the commentary accompanying § 3B1.1(c) that indicates that he must supervise, manage, or control another co-defendant in order to qualify for the enhancement.

As this court explained in its original opinion, the record supports the conclusion that Novoa exercised management responsibility over the Jobe accounts. This type of managerial control may warrant an upward *departure* from the sentencing range under the management of assets theory described in USSG § 3B1.1(c), comment., n. 2.

---

[8] While this court holds that no reasonable jury could conclude that Stanley Jobe made false statements on a loan application as charged in Count 5, as we have already explained, a reasonable jury could have concluded that Stanley aided and abetted the making of false statements on the Deer Creek Spice loan as charged in Count 6.

Novoa has correctly pointed out that the district court did not impose a departure, and this court's reasoning in adverting to grounds for a departure was incorrect. The district court imposed a two-level upward *adjustment* under § 3B1.1(c) for Novoa's alleged role as an organizer, leader, manager, or supervisor of criminal activity. However, such an adjustment is proper only if Novoa was the organizer or leader of at least one other participant in the crime and if he asserted control or influence over at least that one participant. *See United States v. Ronning,* 47 F.3d 710, 711-12 (5th Cir. 1995). Because the record contains no evidence that Novoa managed or supervised any of his co-defendants or any other people in connection with the illegal check kite, this court must vacate the district court's upward adjustment of Novoa's sentence and remand for resentencing.

V. Factual Clarification

In this court's original discussion of the facts of this case, we noted that "in late 1989, Jobe Concrete Products purchased a spice plant from the Baltimore Spice Co. for nearly $3,500,000 and Cal-Tex Spice Co." *Jobe,* 77 F.3d at 1466. The appellants now explain that this is technically incorrect, as Jobe Concrete Products was not actually the legal entity that purchased the relevant spice plant. Instead, the spice plant was purchased by Cal-Tex Spice Co., owned by Billie Mac Jobe and Frank Owen V. Because the appellants allege that this technical misstatement may somehow affect Jobe Concrete Products, Inc., our original opinion is hereby amended to clarify that the purchaser of the spice plant was actually Cal-Tex Spice Co. This factual amendment has no effect whatsoever on any of the reasoning or legal conclusions of either the original opinion or the instant one.

VI. Other Issues raised on Rehearing

The court has carefully considered other issues raised on rehearing by appellants and finds them meritless.

CONCLUSION

For the foregoing reasons, this court on rehearing AFFIRMS all of the remaining convictions, except that it REVERSES Stanley's conviction as charged in Count 5 for making false statements on a loan application, and REMANDS Novoa for resentencing.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50646

United States of America,

Plaintiffs-Appellee,

versus

Billie Mac Jobe, Stephen Taylor, Philip Mark Sutton,
Stanley Pruet Jobe, and Fernando Novoa,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

(Filed Mar. 8, 1996)

Before JONES, STEWART and PARKER,* Circuit Judges.

EDITH H. JONES, Circuit Judge:

Appellants Billie Mac Jobe ("Billie Mac"), Stanley Pruet Jobe ("Stanley"), Stephen Taylor, Philip Mark Sutton and Fernando Novoa were convicted by a jury of various offenses undertaken to organize, conduct, and maintain an elaborate and expanded check-kiting scheme through El Paso banks for over a year and a half. On appeal, they pose numerous challenges to their convictions and sentences. After carefully considering these challenges and the underlying record, this court AFFIRMS the conviction as charged in Count 2 for all of the appellants, VACATES Stanley's managerial or supervisory sentencing enhancement, and REMANDS Stanley's case for resentencing.

---

* After oral argument, Judge Parker recused himself from any further participation in this matter. This opinion reflects only that of Judges Jones and Stewart.

FACTUAL BACKGROUND[1]

The appellants were indicted for bank fraud, in violation of 18 U.S.C. § 1344 and 2, and for conspiracy to commit bank fraud, to make false entries in bank records, and to obtain loans via false statements in loan applications, contravening 18 U.S.C. § 371. In addition, the indictment charged that some or all of the appellants had made false statements on loan applications,[2] false bank entries, reports, and transactions,[3] laundered funds,[4] or aided and abetted such activities.[5] The indictment requested a criminal forfeiture of property.[6]

The district court bifurcated the criminal trial and the request for criminal forfeiture. After nearly two weeks of trial on the criminal charges, the jury returned the following verdicts: all defendants were convicted of conspiracy to commit bank fraud ("Count 1"); Billie Mac was convicted of bank fraud, while Stanley, Taylor, Sutton, and Novoa were convicted of aiding and abetting this bank fraud ("Count 2"); Taylor and Sutton were convicted of making false bank entries in violation of 18 U.S.C. §§ 1005 and 2 (collectively, Counts 4, 6, and 16); and Stanley was convicted both of aiding and abetting Sutton to make a false bank entry (Count 6) and of making false statements on a bank loan application (Count 5).[7]

---

[1] Our review of the record was much more difficult because the parties frequently either furnished incorrect record citations or no citation at all.

[2] 18 U.S.C. § 1014.

[3] 18 U.S.C. § 1005.

[4] 18 U.S.C. § 1956(a)(1)(A)(I).

[5] 18 U.S.C. § 2.

[6] *See* 18 U.S.C. §§ 982(a)(1)-(a)(2)(A), 982(b)(1)(A)-(B).

Although each appellant was convicted by the jury of various offenses undertaken to organize, conduct, and maintain an elaborate check kiting scheme, at the sentencing hearing, the district court found no evidence of monetary loss to any of the financial institutions involved. In part for this reason, the appellants received light concurrent sentences: Billie Mac was sentenced to eighteen months incarceration and fined $30,000; Stanley received five months incarceration, five months of community confinement in a residential facility or half-way house, and a $15,000 fine; Taylor, ten months incarceration; Sutton, ten months incarceration; and Novoa, five months incarceration and five months of community confinement in a residential facility or half-way house; the appellants were also ordered to serve three-year terms of supervised release.

---

[7] The district court, after a separate forfeiture proceeding, entered a judgment of acquittal on those allegations.

A discussion of some of the voluminous evidence concerning the appellants' relationships to the involved financial institutions and the crucial transactions involved in the prosecution is necessary to understand this opinion's analysis.

Billie Mac was a 1/3 owner, officer and director of Jobe Concrete Products, Inc., in El Paso, Texas. He also owned the Jobe Bar Track Ranch and was a part owner, officer and director of Cal-Tex Spice Co. He and his son, Stanley, owned a 40% share of First Park National Bank ("FPNB") of Livingston, Montana, a federally insured financial institution. Billie Mac maintained checking accounts at FPNB as well as at El Paso State Bank ("EPSB"), a federally insured, state chartered bank in El Paso; Jobe Concrete Products and Cal-Tex Spice had checking accounts at EPSB. Billie Mac was a shareholder of EPSB.

Stanley, Billie Mac's son, was president and a 1/3 owner of Jobe Concrete Products, Inc., a partial owner and director of Cal-Tex Spice Co. and a shareholder and director of EPSB. At FPNB in Montana, Stanley maintained a checking account and sat on the board of directors.

The remaining appellants are employees of some of the financial institutions involved. Taylor was the president of EPSB. Novoa, as a cashier and officer of EPSB, approved significant wire transfer transactions involving Billie Mac. After leaving his employment with EPSB, Novoa became president of Cal-Tex Spice and performed various financial and administrative work for Jobe Concrete Products. Sutton was the president of another federally insured bank used in the kite, Continental National Bank ("CNB").

The scope of the expanded check kite was uncovered essentially by FBI special agent Randy Wolverton ("Wolverton"), whose analysis of the activity in several Jobe checking accounts from December of 1989 through July of 1991, revealed that a large kite was underway involving Billie Mac and Stanley and their checking accounts at CNB, TCB, FNPB, and EPSB.

In order to manipulate and maximize the float, or lag time between transactions in the banking system, Billie Mac and his cohorts inflated his account balances artificially by making countless wire transfers based on uncollected funds, by writing checks against uncollected or nonexistent funds, and by consummating fraudulent loans that were camouflaged by false entries or statements in bank records. As a result of these machinations, very large checks were routinely paid in full despite the actual insufficiency of funds to cover them. Billie Mac's check kite was remarkably efficient; unlike the vast majority of check kites, this one not only stayed constantly ahead of the lag but never did self-destruct. Evidence at trial demonstrated that none of the checks written by Billie Mac was ever dishonored or returned for insufficient funds, and all of the loans used to commence the kiting scheme were paid in full and with interest to the lenders.

Further evidence of the "success" of the check-kiting is revealed by the vast sums of money floated. Wolverton testified that bank records for December 1, 1989 through March 12, 1990, created the impression that $150,000,000 had been deposited into the Jobe accounts, although less than 15% of that figure, or approximately $20,000,000, was actually present in these accounts. Similarly, from April through June of 1991, Wolverton explained that although bank records indicated that $58,000,000 was deposited into these accounts, "77% of those, or about $44,000,000 worth of those deposits, were nothing more than checks and wire transfers being exchanged with each other through these accounts, thereby artificially inflating the accounts." Only $13,000,000 was actually deposited into the accounts.

Profits from the scheme were used to finance business ventures for Billie Mac and Stanley. For example, in late 1989, Jobe Concrete Products purchased a spice plant from the Baltimore Spice Co. for nearly $3,500,000 and Cal-Tex Spice Co. Austin Hale ("Hale"), the credit manager and eventually vice-president of Jobe Concrete Products, testified that neither Jobe Concrete Products nor Billie Mac had enough liquidity to fund these purchases. Hale further testified that Stanley concurred and expressed his concern to Hale that the company needed cash not only to finance its investment and business activities, but also so that his father, who was "overly stressed about the situation", would not need to work as hard.

Billie Mac commenced the kite by opening a checking account for the Jobe Bar Track Ranch at CNB. Before it was officially opened, Billie Mac wrote himself a check from the new account or starter booklet for $990,000, endorsed this check, and deposited it at EPSB. The opening balance of the CNB checking account was, however, only $1,000. Sutton was the account officer at CNB supervising the Jobe Bar Track Ranch checking account.

After the CNB check was deposited at EPSB, EPSB issued a cashier's check for $3,536,347 to Billie Mac signed by Taylor, the bank president. Although standard banking practice would require EPSB to post an entry in its books or records indicating that the cashier's check had been issued, no such entry was made in EPSB records that day; in fact, no entry was made into EPSB records until several days later on January 4, 1990. Nearly a week earlier, on the same afternoon that he obtained the EPSB check, Billie Mac used this cashier's check to purchase the spice plant.

When the original $990,000 CNB check was presented for payment at that bank, Martha Karlsruher ("Karlsruher"), a senior vice president and bank cashier, noticed that this large check had been written on the Jobe Bar Track Ranch account before it had opened and that the balance in the account was merely $1,000. She immediately advised Sutton of her findings, but he authorized forced payment of the check nonetheless, explaining that a pending loan from CNB to Billie Mac would provide the necessary funds.

As Sutton had explained, CNB did lend Billie Mac $925,000, its legal lending limit, on January 8, 1990 and back-dated this loan to January 5. The loan's stated purpose was to "[r]eplenish personal liquidity utilized in the purchase of Baltimore Spice of Texas." However, the loan did not replenish Billie Mac's personal liquidity, but was rather deposited directly into the Jobe Bar Track Ranch checking account, so that the $990,000 check that had been presented for payment could clear. Karlsruher further explained that because the bank's management and loan committee were "in a hurry to fund the loan [and] disburse the monies to the customer," they did not review Billie Mac's loan application before approving it.

This type of suspicious activity continued in the Jobe Bar Track Ranch account and in other accounts including the Jobe Concrete Products checking account at Texas Commerce Bank ("TCB"). In February or March of 1990, Hale, Jobe Concrete's credit manager, learned that Billie Mac was signing checks on the Jobe Concrete Products account but failing to list either a payee or amount on the company's check log. Hale began to be "suspicious of a check kite." As these suspicions grew, he "started looking for another job" and eventually quit in November of 1991.

The check kiting activity also became more obvious to employees in the banks used in the kite. For instance, from January through July of 1990, Karlsruher, who had already noticed unusual activity in the Jobe Bar Track Ranch account at CNB and had discussed this with Sutton, warned Sutton repeatedly that she suspected kiting by Billie Mac and that any further loans to him would exceed CNB's legal limit. Sutton assured her that "it was a normal business practice for certain companies to operate this way," but Karlsruher disagreed and had not observed such practice in her experience as a banker.

Sutton's actions began to breach standard banking practice or policy. He occasionally extended CNB's closing deadline in order to give Billie Mac sufficient time to deposit or wire funds to cover overdrafts.[8] Karlsruher testified that Billie Mac was virtually the only customer who received such specialized treatment.[9] Further, despite express warnings from Karlsruher that kiting was going on and that a criminal referral should be filed regarding Billie Mac's activities, Sutton continued to approve forced payment of countless checks written by Billie Mac far in excess of the balance in the Jobe Bar Track Ranch account at CNB. Although Karlsruher could have filed a criminal referral regarding the activity, she explained that she did not do so because she was "provided a copy of a board resolution that ordered management not to file this referral."

Others associated and employed by CNB, who could not help but notice that Sutton was approving numerous forced payments on checks written by Billie Mac, came to share Karlsruher's concerns about the check kite. Patrick Kennedy ("Kennedy"), CNB's attorney, reviewed some of Billie Mac's activities in the Jobe Bar Track Ranch account and suggested that CNB file a criminal referral. Although Kennedy repeatedly attempted to discuss this suggestion with Sutton and to obtain additional information from him, Sutton was unresponsive. Patricia McLean ("McLean"), CNB's loan review officer, not only suggested that a criminal referral be filed, but also expressed concerns to Sutton that if CNB continued to lend to Billie Mac or any affiliated entity, the bank might exceed its legal lending limits. Yet again, these warnings went unheeded.

---

[8] The closing deadline at CNB was normally 2:00 p.m. If the bank could not settle its funds by that time, these funds were not available for overnight investment and the bank risked losing the corresponding overnight interest.

[9] As Karlsruher explained, "[t]he only [other customer] that comes to mind, but that was a few years later, that [sic] would have been El Paso Auction."

Indeed, loan activity at CNB involving the Jobes continued. On May 21, 1990, with Sutton acting as the bank's loan officer, CNB funded a $750,000 loan to Deer Creek Spice Co., guaranteed by Stanley. In a loan presentation form, an internal document prepared by bank employees, the purpose of the Deer Creek Spice loan was described as acquisition of inventory, and the loan principals were listed as Stanley and Frank Owen IV. Although the size of the Deer Creek Spice loan mandated review by CNB's management loan committee, no such review occurred.

On the very day that the Deer Creek Spice loan was authorized, Stanley endorsed the check for the proceeds and turned it over to Billie Mac who, in turn, deposited it into the cashier's checking account at EPSB. The proceeds of the Deer Creek Spice loan were used to pay for cashier's checks that Billie Mac had obtained from EPSB earlier in the day. These cashier's checks had been deposited at CNB to allow a $750,000 check written against the Jobe Bar Track Ranch account to clear; not surprisingly, the $750,000 check had been written by Billie Mac and was payable to him.

Eventually, Sutton, Karlsruher, and McLean were asked to meet with Kennedy, John Wright, the chairman of the board of CNB, and Jack Cardwell, a board member, to discuss Billie Mac's relations with the bank. After the meeting, Karlsruher testified that Sutton ordered her not to contact either bank directors or bank attorneys without his preclearance; he threatened to fire her or any other employee who filed a criminal referral on Billie Mac and promised her a promotion and raise for her cooperation. Sutton stressed to her that a criminal referral on Billie Mac "would cause [the Jobes] serious financial harm and setbacks and that the other banks they were dealing with may call their loans . . . once an investigation ensued." Finally, however, after a CNB board meeting in June of 1990, the Jobe Bar Track Ranch checking account was closed and Billie Mac paid CNB for his use of uncollected funds an amount equal to what the bank would have earned in an overnight investment of those funds at the federal funds rate. Of course, as Karlsruher explained, the federal funds rate is lower than the commercial loan rate.

Undaunted, Billie Mac and his cohorts continued their expanded check kite even after the CNB account closed. Loans from other banks were used to float the kite, and unconventional wire transfer procedures both inflated checking account balances artificially and concealed insufficient funds or overdrafts. Unlike checks, wire transfers experience no float or lag time. When a normal electronic wire transfer occurs, funds are simultaneously deducted from the transferring institution's account at the Federal Reserve and credited to the recipient's bank account.

But Billie Mac's multiple wire transfers were not conventional ones. Taylor, the president of EPSB, and Novca, the bank's cashier and senior officer in charge of accounting and of the wire transfer room, authorized wire transfer personnel to credit Billie Mac's checks immediately and to make wire transfers for him without waiting for the necessary funds to be collected.[10] Diana Vincent, an internal auditor with EPSB, testified that the countless wire transfers completed for Billie Mac on uncollected funds violated standard EPSB policy that all wires be paid for with collected funds. Vincent also testified that had Billie Mac been forced to comply with bank policy and deposit sufficient funds before conducting a wire transfer, his insufficient accounts would have appeared on the bank's uncollected funds or overdraft reports. Billie Mac's accounts escaped these reports because Novoa was initialing most of Billie Mac's checks and approving them for immediate credit.[11] According to Laura Avila an employee in the EPSB wire transfer room, both Novoa and Taylor would initial the checks to authorize immediate credit.

Because of the specialized treatment that Billie Mac received from Taylor and Novoa at EPSB, he made the bank's wire transfer department a second home, visiting several times daily from January through September of 1990 and sending hundreds of wire transfers during that time. At trial, the testimony of Avila and Maria Reyes

---

[10] Although this practice is unconventional, the government concedes that it is not necessarily illegal. Banks enjoy some discretion to extend immediate or "next day" credit on uncollected funds.

[11] Although Vincent explained that, in most instances, Novoa's initials appeared on the checks, she admitted that occasionally other officers or authorized personnel would initial them.

Novoa's administrative assistant who supervised the wire transfer room, indicated that Billie Mac's transfers began at around $50,000 a day, but quickly grew to $500,000 and then to a combined daily total of $1,000,000.

These frantic and unconventional wire transfers led other employees at EPSB to suspect kiting. For instance, Reyes grew concerned about the fact that Billie Mac was allowed to conduct wire transfers when his accounts were insufficient to pay for these transfers. Reyes recounted that once, after she had verified that the account against which Billie Mac had intended to pay for the transfer had insufficient funds, she took the check to Novoa and, although she did not expressly inform him of the insufficiency, he ordered her to proceed with the wire transfer. As this transfer activity continued, Reyes eventually spoke with Taylor, but to no avail. She explained, "[s]ince I was concerned, I went and asked [Taylor], you know, if he was aware that the checks were, you know, going through. And he told me that he was going to check into it and that he would get back to me. But he never got back to me."

Yvonne Pearson, an employee in the proof department at EPSB, testified that since Billie Mac was allowed to conduct transfers on uncollected funds, proof department employees were allowed to override the proof machine's time consuming determination of the float for a check. To circumvent the proof machine, Billie Mac's checks were deposited using special deposit slips initialed by bank officers to allow for next-day availability; most of these deposit slips were initialed by her boss, Novoa. Furthermore, when Billie Mac would present such a deposit slip, a special transaction code would be entered into the bank's records that would prevent the checks from appearing on the bank's uncollected funds report. Because of these suspicious activities and practices, Pearson concluded that she "knew" that Billie Mac was kiting checks.

Vincent, EPSB's internal auditor, warned Taylor in a memorandum that Billie Mac was kiting checks "to the tune of $790,000 to $1,760,000 a day, and this amount is steadily increasing," as well as conducting wire transfers on uncollected funds. Moreover, she explained that Taylor's and Novoa's decision to extend Billie Mac next day availability on checks made it difficult to ascertain the full extent of the ongoing kite. Taylor delayed responding to Vincent for nearly three weeks before asking her "to track the activity for a few days and report back to him."

Vincent did exactly that. After tracking Billie Mac's accounts for two days, she sent Taylor another memorandum detailing transactions in which Billie Mac was given more than $3,200,000 in immediate credit to pay for wire transfers from EPSB. After Taylor received this memo, Vincent testified that to her knowledge, Taylor did not take any remedial action and did not speak with her about either the memo or the activity which had been tracked.

Even Billie Mac's own employees began to question the deposit and wire transfer activity at EPSB. Hale, the vice president of Jobe Concrete Products, testified that he had a conversation with Billie Mac regarding this activity. According to Hale, Billie Mac explained that Novoa had developed a system by which he could receive immediate credit for deposits merely by using special deposit slips.[12] Eventually, Novoa resigned his position at EPSB and went to work for his esteemed customer, Billie Mac, as president of Cal-Tex Spice and at Jobe Concrete Products.

Upon Novoa's departure from EPSB, Barbara Baker ("Baker"), the acting cashier for the bank, learned about the practice of allowing Billie Mac to conduct wire transfers on uncollected funds. She testified that this practice did not leave a good audit trail and impeded the bank's ability to analyze float and collectability of Billie Mac's checks. Baker then sent Taylor a memo reiterating these conclusions and suggesting that funds be collected from Billie Mac before he be allowed to conduct a wire transfer.

After sending the memo to Taylor, Baker met with him. She testified that during this meeting, Taylor appeared shocked by the activity in Billie Mac's accounts; as Baker recalled, "[Taylor] had the memo in his hand and he just kind of shook his head a little bit and said, 'Billie Mac is kiting. How long did he think he could get away with this?' " Taylor then gathered the copies of Baker's memo and "threw them in the trash and he said he wanted all the copies out of circulation. He didn't want any copies of the memo in the bank." However, even after receiving memoranda from both Baker and Vincent, Taylor still approved wire transfers for Billie Mac on uncollected funds.

---

[12] On appeal, Novoa objects to this portion of Hale's testimony under *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968). The objection will be discussed *infra*.

Perhaps exhausted by his daily trips to the wire room at EPSB, Billie Mac began wiring funds from CNB where he no longer had an account. Much as Taylor and Novoa had ordered at EPSB, Sutton authorized Billie Mac to conduct wire transfers on uncollected funds, even though no other customer was regularly extended such a privilege. However, these transactions, unlike the transfers at EPSB, were appearing regularly on the bank's "deficit available balance report" as suffering from a large, uncollected balance. Sutton approached Karlsruher with a proposal to give Billie Mac's checks a special transaction code which would camouflage them from the bank's reporting system. She refused to participate in such a scheme.

The very day that bank examiners arrived at CNB to analyze the transfer activity, Billie Mac stopped making wire transfers from that bank. As the bank examiners analyzed accounts at CNB and at EPSB, they began to discover the vast extent of Billie Mac's kiting scheme. For instance, while EPSB was lending Billie Mac and Stanley over $1,000,000 each year, the bank's average collected balances were negative.

While the bank examiners continued to investigate, Taylor spoke to Tom Burress ("Burress"), one of the examiners analyzing loans and accounts at EPSB. Taylor wanted to explain the cashier's check for over $3,500,000 that Billie Mac had been given on December 29, 1989, without any confirmation that he had sufficient funds to pay for it. Taylor told Burress "[t]hat Fernando Novoa presented the check for him to sign. Taylor signed the check without verifying that there [sic] collected funds in the account sufficient to pay for the check. His stated reason was that he had faith in the cashier that that [sic] was okay." Taylor also told Burress that he believed that Novoa had held some checks written by Billie Mac in his desk until January 4, 1990, the date on which the cashier's check was actually purchased. The next day, however, Taylor changed his story, suggesting that "he was wrong in accusing [Novoa] of holding the checks in his drawer. And prior to this occurrence, he had no reason to fault [Novoa's] work."[13]

As the involvement of bank examiners and federal agents intensified, Billie Mac's expanded check kite came to a crashing halt. At trial, there was substantial disagreement over the loss, if any, that the banks involved in this kite had suffered. All of the loans and checks had been paid and honored. From this fact, Rene Pena ("Pena"), a certified public accountant who testified as a defense expert, concluded that the banks had suffered no loss. Although Pena recognized that the various Jobe accounts were frequently in overdraft, he noted that this overdraft was usually corrected quickly. According to Pena, Billie Mac was merely "actively utilizing the loans in a constant cash management . . . of running the [Jobe] entities as a whole."

---

[13] Novoa challenges the admission of Taylor's statements through Burress under *Bruton*. This issue will be discussed *infra*.

DISCUSSION

I. Appellants' Common Challenges to their Convictions

A. Juror Misconduct

Billie Mac, Stanley, Sutton, and Novoa appeal the district court's denial of an evidentiary hearing to investigate allegations of juror misconduct and its denial of their motions for a new trial based partially on this alleged misconduct.

Appellants complain that during the trial, John A. Shamaley ("Shamaley"), one of the jurors, was told by a relative that Billie Mac had "previously been convicted in another bank fraud case." In an affidavit submitted to the district court, Shamaley explained that at some time during the trial, he told David Carnes a relative, that Carnes's employer, Jack Cardwell had been mentioned during the trial; Cardwell was a member of the board of directors of CNB. Carnes told Shamaley that Billie Mac had previously been convicted of bank fraud and suggested to Shamaley that because of this prior conviction, "he would not be at all surprised to find that something improper was going on here." However, Shamaley acknowledged in his affidavit that

> [t]here was *no evidence presented at the trial that Billie Mac Jobe had any previous arrests or convictions. I did not relay this information to any of the other jurors* on this case, but I was aware after the conversation with David Carnes that Mr.

> Jobe had previously been convicted of the same offense that he was charged with in this case.[14]

(emphasis added).

This court reviews the district court's denial of a motion for new trial for abuse of discretion. *United States v. Sanchez-Sotelo,* 8 F.3d 202, 212 (5th Cir. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1410 (1994). Likewise, "[t]he procedures used to investigate allegations of juror misconduct and the decision as to whether to hold an evidentiary hearing are matters which rest solely within the sound discretion of the district court." *United States v. Roberts,* 913 F.2d 211, 216 (5th Cir. 1990), *cert. denied sub nom., Preston v. United States,* 500 U.S. 955, 111 S. Ct. 2264 (1991).

Recently, this court reiterated the principle that in any trial there is an initial presumption of jury impartiality. *United States v. Ruggiero,* 56 F.3d 647, 652 (5th Cir. 1995), *cert. denied,* ___ U.S. ___, ___ S. Ct. ___ (1995). This presumption may be defeated, however, through evidence that the extrinsic factual matter actually tainted the jury's deliberations. *Id.* (*citing United States v. O'Keefe,* 722 F.2d 1175, 1179 (5th Cir. 1983)). A district court must investigate the asserted impropriety only when a colorable showing of extrinsic influence is made. *Id.*

---

[14] In fact, the information that Carnes relayed to Shamaley was technically incorrect. In 1979, Billie Mac had pleaded guilty to one count of mail fraud. At a pretrial hearing, the district court indicated that this prior conviction would be admissible at trial for impeachment purposes only if Billie Mac testified; he did not.

Ruggiero not only examined when a district court must investigate alleged juror misconduct, but also explained

> . . . that a defendant is entitled to a new trial when extrinsic evidence is introduced into the jury room unless there is no reasonable possibility that the jury's verdict was influenced by the material that improperly came before it.

Id. (citations omitted). Hence, when extrinsic evidence is introduced into the jury room, the defendant enjoys a rebuttable presumption of prejudice and "the government has the burden of proving the harmlessness of the breach." *Id.* (citations omitted). When the district court considers whether the government has carried this burden, it should examine "the content of the extrinsic material, the manner in which it came to the jury's attention, and the weight of the evidence against the defendant." *Id.* at 652-53 (citations omitted).

In the instant case, the district court investigated the alleged impropriety when it considered Shamaley's affidavit. Through this affidavit and through the evidence at trial, the court was able to conduct the inquiry mandated in *Ruggiero.* Having done so, the court concluded that there was no reasonable possibility that the extrinsic information had prejudiced the appellants. When discussing Billie Mac, the court reasoned that

> The circumstances fail to indicate that Defendant Billie Mac Jobe was prejudiced by the incident. Juror Shamaley obviously attributed no significance to the incident, because he did not report it to the Court or to any other juror. Furthermore, the record shows that Billie Mac

> Jobe was named as a defendant in six counts that were submitted to the jury for a verdict, and the jury found Jobe not guilty as to four of those counts. . . . Under the facts of this case, the Court is unable to find a reasonable possibility that the extrinsic information communicated to one juror prejudiced the Defendant.

Because the information relayed to Shamaley did not taint his deliberations, the information was not relayed to any other jurors, and the evidence against Billie Mac on the counts of conviction was overwhelming, the district court did not abuse its discretion when it denied the appellants' request for a new trial without first ordering an evidentiary hearing.[15] It is unnecessary to apply the *Ruggiero* factors separately to each of the other defendants, as there is no likelihood that they were prejudiced in any way by the tainted report of Billie Mac's prior criminal conduct.

---

[15] Additionally, as *Ruggiero* explains, a court is limited in its ability to inquire into jury deliberations. Federal Rule of Evidence 606(b) forbids a juror from testifying about deliberations, and this rule also bars juror testimony regarding

> at least four topics: (1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberation, and (4) the testifying juror's own mental process during the deliberations.

Ruggiero, 56 F.3d at 652. Given these limitations, an evidentiary hearing would have provided the district court with virtually nothing but what was already contained in the Shamaley affidavit.

B. Jury Instructions

All of the appellants contend that the district court erroneously declined to submit their requested instruction on good faith to the jury. Furthermore, the appellants argue that the instruction given to the jury somehow shifted the burden of proof from the government to the appellants when it failed to inform jurors that the government carried the burden of negating their claims of good faith. The appellants also suggest that the district court erroneously limited their defense of good faith by failing to extend this defense to the false entry offenses.

Billie Mac urges similar error with respect to his requested instructions on willfulness and specific intent. He notes that the district court did not explicitly define either term and suggests that the court's omission seriously impeded his ability to present his defense to the jury.

Recognizing that district courts enjoy substantial latitude in formulating jury instructions, this court reviews the refusal to provide a requested jury instruction for abuse of discretion. *United States v. Smithson,* 49 F.3d 138, 142 (5th Cir. 1995). The district court will not abuse its discretion when it denies a proffered instruction unless this instruction "(1) was a correct statement of the law, (2) was not substantially covered in the charge as a whole, and (3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the defendant's ability to present a given defense." *Id.*

In this case, the district court did instruct the jurors on good faith. The instruction explained that

> [i]n determining whether or not any defendant acted with criminal intent to defraud or deceive, you may consider whether or not that defendant had a good faith belief that what he was doing was legal. If you have a reasonable doubt as to whether or not a defendant had a good faith belief that was [sic] he was doing was legal, you must acquit that defendant or defendants and say by your verdict 'not guilty.'

The appellants' challenges to this instruction are meritless. This instruction in no way reduces the government's burden of proof beyond a reasonable doubt or thrusts a burden on the appellants. Moreover, the court did not limit its good faith instruction to certain appellants or defenses; rather, the instruction provides that the good faith of *any* appellant may be considered when adjudicating his criminal intent on any charged offense.

Although Billie Mac contends that the district court erred when it refused separately to define either willfulness[16] or specific intent, the court clearly defined "knowingly." Indeed, its definition of this term came from this circuit's pattern jury instructions and provided that "[t]he word 'knowingly' as that term is used in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident." Though the district court did not explicitly define specific intent, it correctly charged the jurors on the element of intent in each offense. Both of Billie Mac's proposed instructions on specific intent merely reiterate that the government must prove beyond a reasonable doubt "that the defendants *knowingly* did an act which the law forbids. . . . " (emphasis added). The effect of the proposed instructions is redundant, and they were unnecessary.

---

[16] In its conspiracy instructions, the court instructed the jury that they must conclude beyond reasonable doubt "[t]hat the defendant knew the unlawful purpose of the agreement and joined in it *willfully, that is with the intent to further the unlawful purpose.*" Hence, while the instructions may have not separately defined willfulness, when read as a whole, they did include such a definition.

In sum, the court's instructions accurately reflected the law and substantially covered the appellants' proffered instructions without impairing the ability of any of the appellants to advance a defense.

C. Joint Motion for Severance

Stanley, Taylor, Sutton, and Novoa contend that the district court abused its discretion when it denied their joint motion for severance. The joint motion was premised on the belief that at a separate trial, Billie Mac would provide exculpatory testimony for the appellants. To support this belief, the appellants submitted *in camera* Billie Mac's affidavit, which stated that he would testify at a separate trial in which he was not a co-defendant. The affidavit also asserted that Billie Mac would testify that, to his knowledge, none of the other appellants had committed any of the charged offenses.

The district court denied the joint motion for severance after conducting a hearing. The court reasoned that Billie Mac's affidavit "falls far short of demonstrating a basis for severance." As the court put it, Billie Mac insisted in his affidavit

> that he acted in good faith in connection with all the financial transactions involved in the indictment, and that he committed no offense. The remainder of his affidavit consists of conclusory statements that his co-Defendants did not conspire with him to commit any offense and that they are innocent of any wrongdoing . . . If he gave the testimony at a severed trial, it would have little evidentiary value.

To allege a prima facie case for severance based on the exculpatory testimony of a co-defendant, a defendant must first show, among other things, that the testimony is truly exculpatory in nature and effect. *United States v. Rocha,* 916 F.2d 219, 232 (5th Cir. 1990), *cert. denied,* 500 U.S. 934, 111 S. Ct. 2057 (1991) (laying out detailed criteria for severance based on 26 codefendant testimony). Billie Mac's affidavit did not fulfill that standard.

The appellants rely on this court's decision in *United States v. Neal,* 27 F.3d 1035 (5th Cir. 1994), cert. denied, ___ U.S. ___, 115 S. Ct. 1165 (1995), to support their claim that severance was improperly denied. In *Neal,* this court held that the district court erred when it denied severance in a drug conspiracy case in which the "undisputed leader of the conspiracy" gave extensive, specific, and exculpatory testimony both by affidavit and *in camera* and would have so testified in a separate trial on behalf of the co-defendants. *Id.* at 1047 & 1047 n. 21. Recognizing that "a defendant might suffer prejudice [from a joint trial] if *essential exculpatory evidence* that would be available to a defendant tried alone were unavailable in a joint trial," we vacated the convictions of the co-defendants and remanded for a new trial. *Id.* at 1047 (*citing Zafiro v.*

United States, 506 U.S. 534, 113 S. Ct. 933 (1993)) (emphasis added).

The appellants' reliance on *Neal* is misplaced. In *Neal,* the district court was presented with far more than the conclusory, non-incriminating affidavit offered by Billie Mac; in that case, the defendant gave extensive, specific, and detailed exculpatory testimony. The *Neal* co-defendants suffered specific and compelling prejudice because their trial had not been severed and the testimony never heard. Here, the appellants did not suffer prejudice since the affidavit did not contain any specific exculpatory testimony. *See United States v. Dillman,* 15 F.3d 384 (5th Cir.), *cert. denied,* ___ U.S. ___, 115 S. Ct. 3010 (1992) (no abuse of discretion in denying severance because of the lack of candor reflected in Dillman's affidavit on behalf of his co-defendants and because the "affidavit was in no sense self-incriminatory; it was in fact self-serving. . . . ").

Billie Mac's self-serving, non-incriminating affidavit offered no evidence that would exculpate the other defendants and, like that in *Dillman,* did not justify severance. The district court did not abuse its discretion when it denied this motion.

D. *Gaudin* Error

All of the appellants urge that the Supreme Court's recent decision in *United States v. Gaudin,* ___ U.S. ___, 115 S. Ct. 2310 (1995), requires reversal of their convictions. In *Gaudin,* the Supreme Court held that where materiality is an element of the charged offense, the trial court's failure to submit the question of materiality to the jury violates the defendant's Fifth and Sixth Amendment rights. *Id.* at 2320.

In the present case, the district court instructed the jury on Counts 3, 5, 7, and 10, but *not* on Count 2, that they "need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide." The appellants contend that materiality was an element in each of their counts of conviction and that their constitutional rights were violated when the district court failed to tender to the jury the question of materiality.

The effect of *Gaudin* error, if any, on the multiple verdicts against these defendants is difficult to unravel. Further, the implications of *Gaudin* are subject to dispute. Where materiality is an element of the charged crimes, including bank fraud and making false statements to a federally insured institution, *Gaudin* may cast doubt on the convictions. But as to all defendants except Billie Mac, our discussion is narrowed and simplified by the concurrent sentence doctrine, which holds that so long as a conviction of concurrent crimes can be sustained under any single court, the court need not address any other count. *See, e.g., United States v. Strickland,* 509 F.2d 273 (5th Cir. 1975); *United States v. Rector,* 488 F.2d 1079 (5th Cir. 1973).

As to appellants Sutton, Taylor, Novoa and Stanley Jobe, any *Gaudin* error is rendered irrelevant by the convictions under Count 2 of the indictment for aiding and abetting Billie Mac to commit bank fraud. The government contends, and appellants' counsel conceded at oral argument, that an aiding and abetting conviction does not require proof of materiality, even though the underlying offense of bank fraud requires such proof. To aid and abet an offense, the appellants must share in the criminal intent of the principal and assist the principal's perpetration of a crime. Sutton, Taylor, Novoa and Stanley posit, however, that under the peculiar facts of this case, a necessary finding of materiality is imbedded in all of their Count 2 convictions. Their assertion is based on the fact that Count 2 expressly incorporates paragraph seventeen from Count 1[17]; the Count 2 reference to Count 1 somehow infused it with a materiality requirement for aiding and abetting Billie Mac's bank fraud. This argument is meritless. Paragraph seventeen of Count 1 described the expanded check kite and explained that the kiting scheme was "aided by the occasional deposit of loan proceeds that were obtained fraudulently and used in place of an insufficient check deposit." This language in no way implied that the remaining appellants had to commit fraud in order to aid and abet Billie Mac's bank fraud. Not only is materiality not an issue prerequisite to the Count 2 convictions; those convictions are otherwise properly pleaded and proved against the aiders and abettors.

To secure the Count 2 convictions, the government had to prove "beyond a reasonable doubt that the defendant[s] willingly associated [themselves] with a criminal venture and participated therein as something [they] wanted to bring about. Aiding and abetting means to assist the perpetrator of a crime." *Cloud,* 872 F.2d at 850. Furthermore, "an abettor's criminal intent may be inferred from the attendant facts and circumstances and need not be established by direct evidence." *Id.*

---

[17] As discussed earlier, Count 1 charged the appellants with conspiracy to commit bank fraud in violation of 18 U.S.C. §§ 1344, 1005, 1014, and 371.

From all of the evidence and testimony presented to the jury in this case, a rational trier of fact could have decided that the remaining appellants aided and abetted Billie Mac's bank fraud. *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). The jury could have rationally concluded that these appellants had an intent to defraud the banks by facilitating Billie Mac's bank fraud. In *United States v. Knipp,* 963 F.2d 839, 846 (6th Cir. 1992), the Sixth Circuit affirmed the defendant's aiding and abetting bank fraud conviction where the defendant "allowed . . . [the] overdrafts to continue and that he facilitated the kite to cover them because the overdrafts amounted to huge, unauthorized loans beyond the single customer legal lending limits. . . . " The evidence in the instant case demonstrates that the remaining appellants facilitated Billie Mac's kite in similar and, indeed, more extensive ways. *See also, United States v. Sims,* 895 F.2d 326 (7th Cir. 1990) (finding that the defendant acted with the intent to defraud was sufficient to sustain his conviction for aiding and abetting attempts to commit a wire fraud against a bank). Because the Count 2 convictions must be affirmed against these appellants without regard to *Gaudin* error, there is no need to discuss the other concurrent counts of conviction against them.

Gaudin cannot be wholly avoided as to Billie Mac's Count 2 conviction, however, because his conviction for bank fraud does require a finding of materiality as an element of that offense. *See, e.g., United States v. Spears,* 49 F.3d 1136, 1141 (6th Cir. 1995) ("the determinative factor is the making of the materially false statement with the intent to influence the lender."); *United States v. Davis,* 989 F.2d 244, 247 (7th Cir. 1993) ("a misrepresentation must be material in order to give rise to liability under the bank fraud statute.").

But even this conclusion does not require reversal of Billie Mac's conviction under Count 2. Billie Mac did not object to the district court's failure to instruct the jury on materiality. As a result, this court reviews his *Gaudin* claim for plain error. *See, e.g., United States v. Keys,* 67 F.3d 801 (9th Cir. 1995) (applying plain error analysis and affirming the conviction). Under plain error review, Billie Mac must pass three tests before this court can consider reversal: (1) there was an error; (2) it was clear or obvious; and (3) this error affected the substantial rights of the petitioner. *United States v. Calverley,* 37 F.3d 160, 162-64 (5th Cir. 1994) (en banc) (*citing United States v. Olano,* ___ U.S. ___, 113 S. Ct. 1770, 1776-79 (1993)), *cert. denied,* ___ U.S. ___, 115 S. Ct. 1266 (1995). The Supreme Court has, however, explained that even if these factors are established, a court need not exercise its discretion to correct the error unless it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Olano,* 113 S. Ct. at 1778. Even if we assume that *Gaudin* error was plain because it became so while the case was on appeal, and even if we assume that failure to instruct the jury was a "structural error" such that Billie Mac is not required to show prejudice, *see Keys, supra,* 67 F.2d at 810-11, we may still exercise discretion not to reverse the conviction. After carefully considering the record, this court declines to exercise our discretion to correct the *Gaudin* error for Billie Mac by authorizing a new trial. The evidence against him was overwhelming. Billie Mac has not challenged its sufficiency on appeal. Denying him the formality of a new trial does not effect a fundamental miscarriage of justice. As a result, Billie Mac's conviction and sentence on Count 2 are affirmed. The *Gaudin* error does not mandate reversal on a plain error standard in this case.

II. Appellants' Individual Challenges to their Convictions[18]

A. Stanley's Challenges to the Sentence Enhancements

The district court imposed two different sentence enhancements on Stanley. The first of these is a two-level enhancement imposed under U.S.S.G. § 3B1.1(c) for Stanley's supposed efforts as a manager or supervisor of criminal activity.

Stanley argues that the district court clearly erred when it imposed this enhancement on him because there was no evidence to support the requisite finding under § 3B1.1(c) that he managed or supervised criminal activity. Moreover, the Presentence Report ("PSR"), on which the district court relied, incorrectly concludes that his position as a director of two of the banks involved in the kiting scheme demonstrates that he managed or supervised the criminal activity.

---

[18] Of course, this court will only address those individual challenges that are relevant to a conviction under Count 2.

As this court has frequently explained, the decision to enhance a sentencing guideline will be upheld if it "results from a legally correct application of the Guidelines to factual findings that are not clearly erroneous." *United States v. Sherrod,* 964 F.2d 1501, 1506 (5th Cir. 1992), *cert. denied, sub. nom, Cooper v. United States,* ___ U.S. ___, 113 S. Ct. 832 (1992). Also, a PSR "generally bears sufficient indicia of reliability to be considered as evidence by the trial judge in making the factual determinations required by the guidelines." *United States v. Elwood,* 999 F.2d 814, 817 (5th Cir. 1993).

Nevertheless, a thorough review of the record lends no support to the district court's finding that Stanley somehow managed or supervised the criminal activity. According to *United States v. Ronning,* 47 F.3d 710, 711-12 (5th Cir. 1995), § 3B1.1(c) requires that a defendant be the organizer or leader of at least one other participant in the crime and that he assert control or influence over at least that one participant.[19] There is no evidence that Stanley managed or supervised any of his co-defendants or any other people in connection with the illegal acts. Absent such evidence, this court must vacate his sentencing enhancement under § 3B1.1(c).

---

[19] This is the requirement under § 3B1.1(c) for enhancing Stanley's sentence. As will be discussed later, however, this enhancement is also applicable if the defendant exercised "management responsibility over the property, assets, or activities of a criminal organization." *See* USSG § 3B1.1(c), comment., n. 2.

The second sentence enhancement imposed on Stanley is not as problematic. Under that enhancement, the district court increased Stanley's offense level two levels because it found that he had "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense. . . . " § 3B1.3. This provision

> encompasses two factors: (1) whether the defendant occupies a position of trust and (2) whether the defendant abused her position in a manner that significantly facilitated the commission or concealment of the offense. To determine whether the position of trust "significantly facilitated" the commission of the offense, the court must decide whether the defendant occupied a superior position, relative to all people in a position to commit the offense, as a result of her job.

United States v. Fisher, 7 F.3d 69, 70-71 (5th Cir. 1993).

Stanley raises a litany of challenges to this enhancement. For instance, he contends that his ordinary, commercial relationships with the lenders were not trust relationships; that, although he did have a position of trust with two of the banks involved, he did not use this position to further his father's activities; that his acquisition of a loan was not an abuse of trust; that the Deer Creek Spice loan was from CNB where he occupied no position of trust; and that mere knowledge of his father's activities did not constitute an abuse of trust. While the record is admittedly close on this issue, Stanley's PSR found that Stanley was present at an EPSB meeting with bank examiners in early 1991 and was advised at this meeting of his father's check kiting scheme. Also, he was apprised of Billie Mac's overdrafts that had been covered by wire transfers on the Jobe Concrete Products account at FNPB. As discussed earlier, Stanley was on the board of directors at both EPSB and FNPB. Hence, there is some evidence to support the district court's finding that Stanley occupied positions of trust at both banks and used these positions to facilitate or conceal his father's check kiting scheme. Given this evidence, sentence enhancement under § 3B1.3 for abuse of trust was not clearly erroneous.

B. Novoa's Separate Challenges

1. *Bruton* Claims

Novoa contends that the district court improperly denied his motion to sever, violating his Sixth Amendment right to confrontation as this right was explained by the Supreme Court in *Bruton v. United States,* 391 U.S. 123, 88 S. Ct. 1620 (1968). This court has interpreted *Bruton* to provide that a defendant's Sixth Amendment right to confrontation is violated when "(1) several co-defendants are tried jointly, (2) one defendant's extrajudicial statement is used to implicate another defendant in the crime, and (3) the confessor does not take the stand and is thus not subject to cross-examination." *United States v. Restrepo,* 994 F.2d 173, 186 (5th Cir. 1993). *Bruton* can be violated when a co-defendant's statement "directly alludes to the complaining defendant." *United States v. Beaumont,* 972 F.2d 91, 95 (5th Cir. 1992) (*quoting United States v. Webster,* 734 F.2d 1048, 1054 n. 6 (5th Cir. 1984), *cert. denied, sub. nom, Hoskins v. United States,* 469 U.S. 1073, 105 S. Ct. 565 (1984)). However, severance is proper only in cases where a "defendant's statement *directly incriminates* his or her co-defendants *without reference to other, admissible evidence.*" *Id.* (emphasis added).

Novoa argues that the admission of certain statements by Taylor, through bank examiner Burress, and statements by Billie Mac, through Hale, the credit manager and vice-president of Jobe Concrete Products, violated his Sixth Amendment right to confront witnesses.[20] Neither Taylor nor Billie Mac testified at trial.

The first statement to which Novoa objects under *Bruton* was a statement by Taylor made through bank examiner Burress. At trial, Burress testified as follows:

> Mr. Taylor indicated that on December 29th, the date that check was issued, the cashier, Fernando Novoa, presented him with a check. . . .
>
> That Fernando Novoa presented the check for him to sign. Mr. Taylor signed the check without verifying that there [sic] collected funds in the account sufficient to pay for the check. His stated reason was that he had faith in the cashier that that was okay. . . .
>
> Next, he indicated he asked – When he was told that the transaction was illegal, he asked cashier Fernando . . . Novoa what happened, what was the reason for this, and he did not get an answer. . . .
>
> Stephen Taylor indicated that he felt like Fernando Novoa had some checks in his drawer

---

[20] Both of these statements were highlighted and noted in our earlier discussion of the factual background.

> that were written by Billie Mac Jobe until January 4th, the date that the cashier's check was paid for.[21]

Prior to this testimony, Novoa's counsel objected that the testimony was not admissible as an exception to the hearsay rule under Fed.R.Evid. 801(d)(2)(E).[22] The trial judge then asked Novoa's counsel whether he was asking that the statement not be considered against his client, and Novoa's counsel responded, "Absolutely." The district court then issued a limiting instruction to the jury that it must consider this testimony only as to Taylor.

Novoa correctly contends that the district court's limiting instruction in this case was powerless to rectify an actual *Bruton* error. *Cruz v. New York*, 481 U.S. 186, 190, 107 S. Ct. 1714, 1717-18 (1987). Hence, if the admission of Taylor's statements through Burress violated *Bruton*, the district court's limiting instruction was ineffective.

But Taylor's statements did not violate Novoa's Sixth Amendment right to confront witnesses as this right was explained in *Bruton*. The statements did not directly incriminate Novoa without reference to other admissible evidence. *See Beaumont*, 972 F.2d at 95. The only potentially incriminating statement by Taylor suggested that Novoa kept Billie Mac's checks in his drawer until the date on which the cashier's check was paid.[23] At best, this statement was a tentative opinion by Taylor, one that he later retracted; Burress' testimony included Taylor's retraction of his statement. Taken as a whole, none of Taylor's statements through Burress directly incriminated Novoa, so these statements did not run afoul of *Bruton.*

---

[21] As was noted earlier, Taylor retracted this allegation in a subsequent conversation with Burress.

[22] Novoa had, of course, also moved for severance prior to trial.

[23] Although Novoa suggests that Taylor's statements also accuse Novoa of having dishonestly orchestrated an 'illegal'

Furthermore, because the statements did not directly incriminate Novoa without reference to other admissible evidence, the court's limiting instruction is adequate to protect Novoa from any potential prejudice. As this court recently explained in *United States v. Leal,* ___ F.3d ___, 1996 WL 30673 *5 (5th Cir. 1996),

> [t]he Supreme Court has held that the admission of a nontestifying defendant's confession is permissible if the trial court gives a proper limiting instruction. *Marsh v. Richardson,* 481 U.S. 200, 107 S. Ct. 1702 (1987). This Court has held that a *Bruton* problem arises *only when the statements clearly implicate the codefendant. United States v. Kelly,* 973 F.2d 1145 (5th Cir. 1992). Furthermore, even if a *Bruton* violation occurs, 'the error may be harmless if the statement's impact is insignificant in light of the weight of other evidence against the defendant.'

(citation omitted) (emphasis added). In *Leal,* as in the instant case, the proffered statements did not clearly implicate the codefendant and since "[t]here was no

---

insufficient cashier's check transaction for Jobe, there is no support for this in the record. At most, Taylor suggests that Novoa could not explain why the cashier's check was not posted on bank records for several days. This in no way directly incriminates Novoa.

direct implication . . . the limiting instruction was adequate to prevent prejudice." *Id.* Given both the nature of the proffered statements and the court's limiting instruction, this court concluded in *Leal* as we do now, that "[t]he district court acted well within its discretion in denying the motion to sever trials." *Id.*

The second statement to which Novoa objects was a statement by Billie Mac through Hale. At trial, Hale testified as follows:

> I'm uncertain as to the time, but I did have a conversation with Mr. Jobe about deposit slips at El Paso State Bank. . . .
>
> He told me that he was receiving immediate credit via deposit slips that have been encoded to provide that. . . .
>
> [By "encoded"] I believe he was referring to the micro encoding at the bottom of the deposit slips. . . .
>
> Fernando Novoa [was the person at El Paso State Bank who 'had worked it so that he could receive immediate credit with the encoding]. . . .

Careful review of the record demonstrates that Novoa did not object to this testimony.[24]

Although this testimony is admittedly incriminating to Novoa and might raise *Bruton* concerns, as has been previously explained, because Novoa failed to object to this testimony, this court will review for plain error. After carefully considering the underlying record, this court declines to exercise its discretion to correct whatever *Bruton* error this testimony might contain. Even if this court were to grant Novoa's objection to the statements of Billie Mac through Hale and strike these statements from the record, the evidence is nonetheless more than sufficient to affirm Novoa's conviction and sentence under Count 2 for aiding and abetting bank fraud. Given the other, admissible evidence against Novoa, any *Bruton* error would be harmless, so this court's refusal to rectify it through plain error review does not cause a miscarriage of justice. *See, e.g., U.S. v. Kelly*, 973 F.2d 1145 (5th Cir. 1992) (applying harmless error analysis to an alleged *Bruton* error); *U.S. v. Cartwright*, 6 F.3d 294, 300 (5th Cir. 1993) (holding that no plain *Bruton* error occurred when the evidence of guilt was overwhelming).

---

[24] Earlier in the testimony, Novoa had objected that the government's question inquiring about a period of time, "[b]efore Fernando Novoa came to work for Mr. Billie Mac Jobe and his entities," assumed facts not yet in evidence, but this objection did not relate to the testimony about which Novoa alleges *Bruton* error; no objection was raised to that testimony.

2. Sentence Enhancements

Novoa contends that the district court erred in applying a two level enhancement under § 3B1.1(c) discussed above because he did not manage or supervise any other criminal participant in the check-kiting scheme. He also argues that the district court was clearly erroneous when it refused to grant him a reduction in sentence under § 3B1.2 for his status as a minimal or minor participant in the check kite.

To support his argument that the § 3B1.1(c) enhancement was erroneous, Novoa relies on the language in the commentary accompanying that section that indicates that he must supervise, manage, or control another codefendant in order to qualify for the enhancement. However, as this court explicitly recognized in *Ronning*, "[t]he note recognizes an exception to the control requirement if a defendant exercises management responsibility over a criminal organization's property, assets, or activities." *Ronning*, 47 F.3d at 711. Indeed, the note expressly provides that

> [a]n upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

USSG § 3B1.1(c), comment., n. 2.

Because of this exception to the control requirement, the district court was not clearly erroneous when it imposed a two-level sentence enhancement on Novoa under § 3B1.1(c). Novoa exercised management responsibility over the Jobe accounts in both his capacity as EPSB cashier and as head of the wire transfer room. Evidence at trial also suggested that Novoa authorized multiple transfers for Billie Mac on uncollected funds, made it possible for Billie Mac to receive immediate credit on deposits by using special, endorsed deposit slips, and circumvented not only the proof machine's calculation of the float, but also other bank records through the use of special transaction codes. Novoa exercised management responsibility over the Jobe accounts so as to justify a two-level enhancement under § 3B1.1(c).

Novoa also claims that the district court was clearly erroneous when it failed to grant him a sentence reduction under § 3B1.2. This section provides that

> [b]ased on the defendant's role in the offense, decrease the offense level as follows: (a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels; (b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels. In cases falling between (a) and (b), decrease by 3 levels.

USSG § 3B1.2. On appeal, Novoa claims that he was entitled to a two-level downward adjustment as a "minor participant." The government counters that Novoa has waived this claim since he argued at sentencing for a four-level downward adjustment for his role as a "minimal participant."

The record supports the government's claim that Novoa sought the four-level downward adjustment at sentencing rather than the two-level reduction given to a "minor participant." While this court could conclude that Novoa has waived his claim for treatment as a "minor participant," the district court's denial of this two-level reduction was nonetheless proper because there was ample evidence in the record to support the conclusion that Novoa was more than a minor participant in Billie Mac's check kiting scheme.

CONCLUSION

For the foregoing reasons, this court AFFIRMS the convictions of all of the appellants, VACATES Stanley's managerial or supervisory sentencing enhancement, and REMANDS Stanley for resentencing.

CONVICTIONS **AFFIRMED** AS TO ALL DEFENDANTS; SENTENCE OF STANLEY JOBE **VACATED** AND **REMANDED**.

UNITED STATES DISTRICT COURT
Western District of Texas

UNITED STATES OF AMERICA

v.

PHILIP MARK SUTTON
Defendant.

Case Number
EP-93-CR-420-H(3)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Sep. 20, 1994)

The defendant, PHILIP MARK SUTTON, was represented by James Darnell.

The defendant was found guilty on counts 1, 2, 4, and 6 by a jury verdict on July 1, 1994 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title & Section
18 U.S.C. 1344, 1005, 1014 and 371
18 U.S.C. 1344
18 U.S.C. 1005 and 2
18 U.S.C. 1005 and 2

Nature of Offense
Conspiracy to commit bank fraud
Bank fraud
Making false bank entries
Making false bank entries

Date of Offense
July, 1991
July, 1991
1-4-90
5-18-90

Count Number(s)
1
2
4
6

As pronounced on September 2, 1994, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $200.00, which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 16th day of September, 1994.

Defendant's SSN:
458-11-2525

Defendant's Date of Birth:
6-26-56

Defendant's address:
8201 Wexford; Austin,
TX 78759

/s/ Harry Lee Hudspeth
HARRY LEE HUDSPETH
United States
District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of ten (10) months as to count 1; ten (10) months as to count 2; ten (10) months as to count 4; and ten (10) months as to count 6, sentences of imprisonment imposed in counts 2, 4 and 6 to be served concurrently with that imposed in count 1.

The Court makes the following recommendations to the Bureau of Prisons: that the defendant be committed at F.C.I., Seagoville, Texas or F.C.I., Big Spring, Texas.

The defendant shall surrender to the United States Marshal for that district or surrender at the institution designated by the Bureau of Prisons before 2:00 p.m. on October 3, 1994 unless in the meantime a notice of appeal is filed and an appeal bond is executed.

RETURN

I have executed this Judgment as follows:

____

____

____

____

Defendant delivered on _____ to ____________ at ____________, with a certified copy of this judgment.

____
United States Marshal

By ______________________________
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three (3) years as to count 1; three (3) years as to count 2; three (3) years as to count 4; and three (3) years as to count 6; terms of supervised release imposed in counts 2, 4 and 6 to be served concurrently with that imposed in count 1.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

X̲ If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

X̲ If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not own or possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirements.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report except the Court found that the 11 level increase based on the amount of loss is disallowed and the 3 level increase for role in the offense should only be a 2 level increase.

Guideline Range Determined by the Court:

Total Offense Level: 12
Criminal History Category: I
Imprisonment Range: 10 months to 16 months
Supervised Release Range: 2 to 3 years as to count 1
3 to 5 years as to counts 2, 4 and 6
Fine Range: $3,000.00 to $30,000.00
Restitution: $

The fine is waived or is below the guideline range because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

Conditions of Supervised Release

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF TEXAS

Name PHILIP MARK SUTTON Docket No. EP-93-CR-420H-3

Address 8201 Wexford, Austin, Texas 78759

Under the terms of your sentence, you have been placed on supervised release by the Honorable Harry Lee Hudspeth, Chief United States District Judge for the District of Western/Texas. Your term of supervised release is for a period of 3 years as to Count One and 3 years as to Counts Two, Four and Six (all concurrent to Count One), commencing upon your release from incarceration.

While on supervised release, you shall not commit another Federal, state, or local crime and shall not illegally possess a controlled substance. Revocation of supervised release is mandatory for possession of a controlled substance.

CHECK IF APPROPRIATE:

/X/ As a condition of supervision, you are instructed to pay a fine in the amount of ________; it shall be paid in the following manner ________________.

/ / As a condition of supervision, you are instructed to pay restitution in the amount of _____ to ________; it shall be paid in the following manner ____.

/X/ The defendant shall not possess a firearm or destructive device. Probation must be revoked for possession of a firearm.

/X/ The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

It is the order of the Court that you shall comply with the following standard conditions:

(1) You shall not leave the judicial district without permission of the court or probation officer;

(2) You shall report to the probation officer as directed by the court or probation officer, and shall submit a truthful and complete written report within the first five days of each month;

(3) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

(4) You shall support your dependents and meet other family responsibilities;

(5) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

(6) You shall notify the probation officer within seventy-two hours of any change in residence or employment;

(7) You shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any

paraphernalia related to such substances, except as prescribed by a physician.

(8) You shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

(9) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

(10) You shall permit a probation officer to visit you at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer;

(11) You shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

(12) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

(13) As directed by the probation officer, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm your compliance with such notification requirement.

The special conditions ordered by the court are as follows:

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision or (2) extend the term of supervision and/or modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions, and have been provided a copy of them.

(Signed) Philip Mark Sutton — 9/2/94
PHILIP MARK SUTTON - Defendant — Date

/s/ Pat Barraza — 9/2/94
U.S. Probation Officer/Designated Witness — Date
PAT BARRAZA/lm

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA	§	
v.	§	No. EP-93-CR-420-H
BILLIE MAC JOBE, STANLEY PRUET JOBE, PHILIP MARK SUTTON, STEPHEN TAYLOR, and FERNANDO NOVOA	§	

THE COURT'S INSTRUCTIONS TO THE JURY

MEMBERS OF THE JURY:

You have now heard all of the evidence in the case as well as the final arguments of the lawyers for the parties.

I will now instruct you on the rules of law that you must follow and apply in arriving at your decision in the case.

In any jury trial there are, in effect, two judges. I am one of the judges; the other is the jury. It is my duty to preside over the trial and determine what evidence is relevant under the law for your consideration. It is also my duty at the end of the trial to instruct you on the law applicable to the case.

DUTY TO FOLLOW INSTRUCTIONS

(Multiple Defendants)

You, as jurors, are the judges of the facts. But in reaching your decision as to the facts, it is your sworn duty to follow the law I am now in the process of defining for you. Unless otherwise stated you should consider each instruction to apply separately and individually to each defendant on trial.

Furthermore, you must follow all of my instructions as a whole. You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. It is your duty to apply the law as I give it to you, regardless of the consequences.

By the same token it is also your duty to base your verdict solely upon the testimony and evidence in the case, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted by the parties as jurors in this case, and they have the right to expect nothing less.

EVIDENCE – EXCLUDING ARGUMENT OF COUNSEL

In reaching your decision as to the facts, you may consider only the evidence admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice.

In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

STIPULATIONS

Statements and arguments of counsel are not evidence in the case. When, however, the attorneys on both sides stipulate or agree to the existence of a fact, the jury must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

CHARTS AND SUMMARIES

Certain charts and summaries have been shown to you in order to explain the facts disclosed by the records and other documents which are in evidence in this case. The charts and summaries are themselves in evidence. However, if such charts or summaries do not correctly reflect facts or figures shown by other evidence in the case, you should disregard them. In other words, such charts and summaries are used only as a matter of convenience. If, and to the extent that, you find that they are not correct summaries of facts or figures shown by other evidence in the case, you are to disregard them entirely.

EVIDENCE – INFERENCES – DIRECT AND CIRCUMSTANTIAL

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You may also consider either direct or circumstantial evidence. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating either the guilt or innocence of a defendant. The law makes no distinction between the weight to be given to direct or circumstantial evidence. It requires only that you weigh of the evidence and be convinced of a defendant's guilt beyond a reasonable double [sic] before he can be convicted.

CREDIBILITY OF WITNESSES

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the government or a defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. You may, in short, accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

IMPEACHMENT BY PRIOR INCONSISTENCIES

The testimony of a witness may be discredited by showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness said or did something or failed to say or do something, which is inconsistent with the testimony the witness gave at this trial.

Earlier statements of a witness were not admitted in evidence to prove that the contents of those statements are true. You may consider the earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited in this manner, it is your exclusive right to give the testimony of that witness whatever weight you think it deserves.

IMMUNITY

(Personal Advantage – Vindication)

The testimony of one who provides evidence against a defendant for immunity from punishment or for personal advantage or vindication, must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses. You, the jury, must decide whether the witness' testimony has been affected by any of those circumstances, or by his interest in the outcome of the case, or by prejudice against the defendant, or as a result of being immunized from prosecution. If you determine that the testimony of such a witness was affected by one or more of those factors, you should keep in mind that such testimony is always to be received with caution and weighed with great case.

You should never convict any defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

EXPERT WITNESSES

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify and state his opinion concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

PRESUMPTION OF INNOCENCE, BURDEN OF PROOF – REASONABLE DOUBT

The indictment is not evidence of guilt. It is simply a written description of the specific charge or charges being brought in this case. A defendant is presumed to be innocent of the charge. The presumption of innocence means that a defendant starts the trial with a clean slate. Furthermore, the presumption of innocence remains with a defendant through every stage of the trial and during your deliberations, and the presumption is not overcome unless and until the evidence in the case convinces you beyond a reasonable doubt that a defendant is guilty.

The law does not require a defendant to prove his innocence or to produce any evidence at all. The government has the burden of proving him guilty beyond a reasonable doubt, and, if it fails to do so, you must acquit him.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of a defendant's guilt. There are few things in this world that we know with absolute certainty, and the law does not require that a defendant's guilt be proved beyond all possible doubt. It does require, however, that you be convinced of a defendant's guilt beyond a reasonable doubt before he can be convicted.

A "reasonable doubt" is a real doubt, based upon reason and common sense, after careful and impartial consideration of all the evidence in the case. It is a doubt of the kind that would cause you to hesitate to act in the most important of your own personal affairs.

RIGHT OF DEFENDANT NOT TO TESTIFY

The law does not require a defendant in a criminal case to take the witness stand and testify. You are instructed that no inference whatsoever may be drawn from a defendant's election not to testify in this case. You are further instructed that in your deliberations you are not to mention, refer to, or consider for any purpose the fact that any defendant did not testify.

CONSPIRACY

(18 U.S.C. § 371)
(Count One)

Title 18, United States Code, Section 371 makes it a crime for anyone to conspire with someone else to commit an offense against the laws of the United States. In this case the defendants are charged with conspiring to defraud federally insured financial institutions, to make false entries in the books of federally insured financial institutions with the purpose of deceiving bank examiners and to obtain loans through the use of false statements on loan applications, in violation of Title 18, United States Code, Sections 1344, 1005, and 1014.

A "conspiracy" is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of "partnership in crime" in which each member becomes the agent of every other member.

For you to find a defendant guilty of the crime alleged in Count One of the indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That two or more persons made an agreement to commit the crimes charged in the indictment;

Second: That the defendant knew the unlawful purpose of the agreement and joined in it willfully, that is, with the intent to further the unlawful purpose;

Third: That one of the conspirators during the existence of the conspiracy knowingly committed at least one of the overt acts described in the indictment, in order to accomplish some object or purpose of the conspiracy.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme on one occasion, that is sufficient to convict him for conspiracy even though the defendant had not participated before and even though the defendant played only a minor part.

In order to establish a conspiracy offense it is not necessary for the government to prove that all of the people named in the indictment were members of the scheme, or that those who were members had entered in to any formal type of agreement, or that the members had planned together all of the details of the scheme. Also, because the gist or essence of a conspiracy is the making of the agreement itself, it is not necessary for the government to prove that the conspirators actually succeeded in accomplishing the unlawful plan.

Of course, mere presence at the scene of an alleged transaction or event, even with knowledge that a crime is being committed, or mere similarity of conduct among various persons and the fact that they may have associated with each other does not establish the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some object or purpose of a conspiracy does not thereby become a conspirator.

MULTIPLE CONSPIRACIES

You are further instructed, with regard to the alleged conspiracy offense, that proof of several separate conspiracies is not proof of the single, overall conspiracy charged in the indictment unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. If you find that no such conspiracy existed, then you must acquit all defendants as to that charge. If you find that such a conspiracy did exist, then you must determine who were the members of that conspiracy.

If you find that any defendant was a member of another conspiracy and not the one charged in the indictment, then you must acquit that defendant. In other words, to find any defendant guilty you must find that he was a member of the conspiracy charged in the indictment and not some other, separate conspiracy.

BANK FRAUD

(18 U.S.C. § 1344)

(Count Two)

Title 18, United States Code, Section 1344 makes it a federal crime for anyone knowingly to execute or attempt to execute a scheme or artifice to obtain any of the moneys or other property owned by or under the custody or control of a federally insured financial institution by means of false or fraudulent pretenses or representations.

For you to find any defendant guilty of the crime alleged in Count Two of the indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly executed or attempted to execute a scheme or artifice to defraud Texas Commerce Bank, Continental National Bank, El Paso State Bank, United New Mexico Bank, First National Bank of Pecos, First Sierra National Bank, or First National Park Bank of Livingston, Montana; and,

Second: That the above listed banks were at the time federally insured financial institutions.

The words "scheme" and "artifice" mean any plan or course of action intended to deceive others and to obtain, by false or fraudulent representations, money or property.

A statement or representation is "false or fraudulent" if it is known to be untrue and made or caused to be made with the intent to deceive.

A false or fraudulent representation may be made by statements of half truths or by the concealment of material facts as well as by affirmative statements of facts.

The word "knowingly" as that term is used in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

FALSE STATEMENT TO A BANK

(18 U.S.C. 1014)

(Counts Three, Five, Seven, and Ten)

Title 18, United States Code, Section 1014, makes it a crime for anyone knowingly to make a false statement or report to a federally insured financial institution for the purpose of influencing the institution in connection with any loan commitment, or advance, or any extension or renewal of the same.

For you to find Defendant Billie Mac Jobe guilty of the crime alleged in Count Three of the indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That Continental National Bank was a federally insured financial institution at the time described in the indictment;

Second: That the defendant made a false statement or report to Continental National Bank knowing it was false; and

Third: That the defendant did so for the purpose of influencing the bank's actions with respect to a loan application.

For you to find Defendant Stanley Pruet Jobe guilty of the crime alleged in Count Five, you must be convinced that the government has proved each of the following beyond a reasonable doubt.

First: That Continental National Bank was a federally insured financial institution at the time described in the indictment;

Second: That the defendant made a false statement or report to Continental National Bank, knowing it was false; and

Third: That the defendant did so for the purpose of influencing the bank with respect to a loan application.

For you to find Defendant Stanley Pruet Jobe guilty of the crime alleged in Count Seven, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That El Paso State Bank was a federally insured financial institution at the time described in the indictment;

Second: That the defendant made a false statement or report to El Paso State Bank, knowing it was false; and

Third: That the defendant did so for the purpose of influencing the bank with respect to a loan application.

For you to find Defendant Billie Mac Jobe guilty of the crime alleged in Count Ten of the indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the First National Bank of Pecos was a federally insured financial institution at the time described in the indictment;

Second: That the defendant made a false statement or report to the First National Bank of Pecos, knowing it was false; and

Third: That the defendant did so for the purpose of influencing the bank with respect to a loan application.

It is not necessary for the government, however, to prove that any of the above institutions involved, were, in fact influenced or misled. What must be proven is that the defendant in each count intended to influence the bank by the false statement or report.

If you find that the government has proved these things, you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide.

FALSE STATEMENTS IN BANK RECORDS

(18 U.S.C. § 1005)

(Counts Four, Six, and Sixteen)

Title 18, United States Code, Section 1005 makes it a crime for anyone to make a false entry in any record of a federally insured financial institution, knowing the entry is false, with intent to defraud the institution.

For you to find Philip Mark Sutton or Billie Mac Jobe guilty of the crime alleged in Count Four of the indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That Continental National Bank was a federally insured financial institution at the time described in the indictment;

Second: That the defendant made a false entry in a record of Continental National Bank;

Third: That the defendant did so knowing it was false; and

Fourth: That the defendant did so intending to deceive the national bank examiners.

For you to find Philip Mark Sutton or Stanley Pruet Jobe guilty of the crime alleged in Count Six of the indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That Continental National Bank was a federally insured financial institution at the time described in the indictment;

Second: That the defendant made a false entry in a record of Continental National Bank;

Third: That the defendant did so knowing it was false; and

Fourth: That the defendant did so intending to deceive the national bank examiners.

For you to find Defendant Stephen Taylor guilty of the crime alleged in Count Sixteen of the indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That El Paso State Bank was a federally insured financial institution at the time described in the indictment;

Second: That the defendant made a false entry in a record of El Paso State Bank;

Third: That the defendant did so knowing it was false; and

Fourth: That the defendant did so intending to deceive the Texas State Department of Banking and the Federal Deposit Insurance Corporation.

You are instructed that the intentional omission of an entry in bank records may be a "false entry" within the meaning of this law.

INTERNAL POLICIES OR RULES, CIVIL STATUTES AND REGULATIONS

The government has introduced testimony during trial regarding certain internal policies or rules of the banks and certain civil statutes and regulations in this case. You are cautioned that you may not find a defendant guilty of an offense solely because that defendant may have violated such a policy or rule of the bank or civil statute or regulation.

FEDERALLY INSURED FINANCIAL INSTITUTION

The term "federally insured" means that the deposits in a bank or other financial institution are insured by the Federal Deposit Insurance Corporation.

LAUNDERING OF MONETARY INSTRUMENTS

(18 U.S.C. § 1956(a)(1) (A)(i))
(Count Twenty-five)

Title 18, United States Code, Section 1956(a)(1) (A)(i) makes it a crime for anyone, knowing the property involved in a financial transaction represents the proceeds of an unlawful activity, to conduct or attempt to conduct such a financial transaction with the intent of promoting the carrying on of a specified unlawful activity.

For you to find Defendant Billie Mac Jobe guilty of the crime alleged in Count Twenty-five of the indictment, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant conducted or attempted to conduct a financial transaction involving the proceeds of a specified unlawful activity, to wit: the making of a false statement on a loan application;

Second: That the defendant knew that the property involved in the transaction represented the proceeds of some form of illegal activity; and

Third: That the defendant acted with the intent to promote the carrying on of a specified unlawful activity, to wit: bank fraud.

Bank fraud and material false statements to obtain loans are "specified unlawful activities" within the meaning of the statute.

The term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction.

The term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, by whatever means effected.

The term "financial transaction" means a transaction involving the movement of funds by wire or other means or involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

AIDING AND ABETTING

(18 U.S.C. § 2)

(Counts Two, Four, Six, and Sixteen)

The guilt of a defendant in a criminal case may be established without proof that he personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself may also be accomplished by him through direction of another person as his agent, or by acting in concert with, or under the direction of, another person or persons in a joint effort or enterprise.

Therefore, if a defendant is acting under the direction of another person or if the defendant joins another person and performs acts with the intent to commit a crime, then the law holds that defendant responsible for the acts and conduct of the other person just as though the defendant had committed the acts or engaged in such conduct himself.

Notice, however, that before a defendant may be held criminally responsible for the acts of others it is necessary that the accused deliberately associate himself in some way with the crime and participate in it with the intent to bring about the crime.

Of course, mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find a defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the laws.

GOOD FAITH DEFENSE

In determining whether or not any defendant acted with criminal intent to defraud or deceive, you may consider whether or not that defendant had a good faith belief that what he was doing was legal. If you have a reasonable doubt as to whether or not a defendant had a good faith belief that, what he was doing was legal, you must acquit that defendant or defendants and say by your verdict "not guilty."

CAUTION – PUNISHMENT (MULTIPLE DEFENDANTS – MULTIPLE COUNTS)

A separate crime or offense is charged against one or more of the defendants in each count of the indictment. Each offense, and the evidence pertaining to it, should be considered separately. Also, the case of each defendant and the evidence pertaining to him should be considered separately and individually. The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant.

I caution you, members of the jury, that you are here to determine the guilt or innocence of the accused from the evidence in this case. The defendant is not on trial for any act or conduct or offense not alleged in the indictment. Neither are you called upon to return a verdict as to the guilt or innocence of any other person or persons not on trial as a defendant in this case.

Also, the punishment provided by law for the offense charged in the indictment is a matter exclusively within the province of the Court, and should never be considered by the jury in any way in arriving at an impartial verdict as to the guilt or innocence of the accused.

DUTY TO DELIBERATE

Any verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.

It is your duty as jurors to consult with one another, and to deliberate in an effort to reach agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, you may choose to reexamine your own views and even change your mind completely after discussing the evidence with the other jurors. However, do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

VERDICT

(Multiple Verdict Form)

Upon retiring to the jury room you should first select one of your number to act as your foreman or forewoman who will preside over your deliberations and will be your spokesperson here in Court. Forms of verdicts have been prepared for your convenience.

(Explain Verdicts)

You will take the verdict forms to the jury room and when you have reached unanimous agreement as to your verdicts, you will have your foreperson fill it in, date and sign it, and then return to the courtroom.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing signed by the foreman or forewoman, and pass the note to the marshal who will bring it to my attention. I will either answer your question in writing or bring you back to the courtroom for other verbal instructions. If you send a written message or question to the Court, however, do not volunteer any information as to how the jury is divided for conviction or acquittal at that particular time.